90-1636

Supreme Court, U.S.
FILED
APR 23 1991
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No. _____

In The

Supreme Court of the United States

October Term, 1990

DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN; AND THE BOARD OF TRUSTEES OF THE DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN,

Petitioners,

vs.

SEAWAY PORT AUTHORITY OF DULUTH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Who is an employer for purposes of the MPPAA?

PARTIES TO THE PROCEEDINGS

Petitioner Duluth-Superior ILA Marine Association Restated Pension Plan is a multiemployer plan as that term is defined in §33 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §1002 (37)(A). Petitioner Board of Trustees of the Duluth-Superior ILA Marine Association Pension Plan administers the Plan. Respondent, Seaway Port Authority of Duluth, is a body politic and corporate, created by the Legislature of the State of Minnesota, under Chapter 469 of Minnesota Statutes.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Duluth-Superior ILA Restated Pension Plan and the Board of Trustees of the Duluth-Superior ILA Marine Association Restated Pension Plan respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 30, 1990.

OPINIONS BELOW

The District Court's Opinion (C1) is not officially reported. The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 920 F.2d 503 (8th Cir. 1990).

JURISDICTION

The Court of Appeals entered its Opinion and Judgment in this case on November 30, 1990. (A1) The Trustees' Petition for Rehearing, filed on December 13th, 1990 was denied by the Court of Appeals on January 23rd, 1991. (B1)

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

§33 of ERISA provides:

> The term "multiemployer" means a plan –
>
> > (i) to which more than one employer is required to contribute, (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and (iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

29 U.S.C. §1002(37)(A)

§514(a) of ERISA provides:

> Except as provided in subsection b (of this Section), the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in §1003(a) of this Title, and not exempt under §1003(b) of this Title. This section shall take effect on January 1, 1975.

29 U.S.C. §1144(a)

§4201(a) of ERISA provides:

> (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. §1381(a)

§4219(a) of ERISA provides:

> An employer shall, within thirty days after a written request from the plan sponsor, furnish

> such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

29 U.S.C. §1399(a)

§469.055(11) of Minnesota Statutes provides:

> Subd. 11. TERMINAL OPERATORS FOR SEAWAY PORT. A seaway port authority may operate its port terminal facilities on its premises as terminal operators. If it does so, the authority may contract with a warehouse operator performing other terminal service to act as its agent. The contract may provide: (1) that the agent will be paid on a monthly basis to operate the facilities; (2) that the agent may hire the necessary personnel to carry out the functions undertaken by the contract; (3) that employees engaged by the agent are employees of the agent and not of the port authority; and (4) that the agent is responsible to pay the employees and to comply with local ordinances and state and federal laws affecting the employees. The seaway port authority may also contract with agents to perform any function that the port authority may do. The seaway port authority may retain power to set rates for a service to be performed in a terminal facility owned, leased, or operated by it.

STATEMENT OF THE CASE

The Duluth-Superior ILA Marine Association Restated Pension Plan is a multiemployer pension plan. (A2) The Seaway Port Authority of Duluth (SPAD) is a public entity and owns and operates the Arthur M. Clure Public Marine Terminal in Duluth, Minnesota. (A2)

From 1977 until May 28th, 1987, SPAD contracted with North Central Terminal Operators, Inc. (NORTH CENTRAL) to manage the terminal. (A2) The contracts between NORTH CENTRAL and SPAD required NORTH CENTRAL to be the employer of all operating personnel and that NORTH CENTRAL would sign any collective bargaining agreements. (A3)[1] The contracts further provided that SPAD would deposit funds from its operating account into a separate payroll account maintained by NORTH CENTRAL to meet its payroll and fringe benefit expenses. (A3) Until disbursed, these funds remained the property of SPAD. (E5) The checks for the pension fund contributions were signed by both SPAD and NORTH CENTRAL personnel. (A3)

On May 28th, 1987, NORTH CENTRAL terminated its relationship with SPAD. (A3) SPAD's Director, Davis Helberg, notified all affected parties that "any agreements or other arrangements in effect with [NORTH CENTRAL] will remain intact because the company at all times operated solely as a managing agent on behalf of the Seaway Port Authority." (F1)

In accordance with the requirements of ERISA, §4219, 29 U.S.C. §1399(a), NORTH CENTRAL completed a Statement of Business Affairs indicating that it never had an obligation to make contributions to the pension plan. (A3) By letter dated July 1st, 1988, the Trustees notified

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[1] This requirement of NORTH CENTRAL to be the employer of all operating agreements and to sign the collective bargaining agreements was in all of the seven Managing Agent Agreements executed between NORTH CENTRAL and SPAD during this period. (A2)

SPAD that they considered it an employer for purposes of the MPPAA, and as a result was subject to withdrawal liability due to NORTH CENTRAL's termination. (A3)(G1)[2] SPAD refused to acknowledge that it was an employer under the MPPAA and instead sought declaratory relief in federal district court to determine whether it was an employer for purposes of withdrawal liability under the MPPAA. (A4)

SPAD filed its complaint for declaratory relief on October 6th, 1988. It contended that it was not an employer for purposes of the MPPAA, and asked the court to so find. (A4) The Trustees counterclaimed for a determination by the court that in fact SPAD was an employer under the MPPAA and common law. (A4) Both parties then brought cross-motions for summary judgment. (A4)

The district court[3] found that there were no disputed material facts, granted SPAD's motion and denied the Trustees' motion. *Seaway Port Authority of Duluth v. Duluth-Superior ILA Marine Association Restated Pension Plan; and the Board of Trustees of the Duluth-Superior ILA Marine Association Restated Pension Plan*, No. 5-88-199 (5th Dist. MN. October 5th, 1989). (C1) By Order dated

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[2] Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) which provides in 29 U.S.C. §1381(a) that if an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined to be the withdrawal liability.

[3] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

November 20th, 1989, the district court amended its Order of October 5th, 1989, to clarify that the court's conclusion as to SPAD's employer status applied only to the time period prior to May 28th, 1987. (D1)

The Court of Appeals affirmed the district court's decision, holding (1) that SPAD is not an employer under the MPPAA because it had no explicit contractual obligation to contribute to the pension plan; and (2) that the state statutory scheme, in light of the fact that SPAD is a creature of state law, requires that NORTH CENTRAL, and not SPAD, be considered the employer for purposes of the MPPAA. *Seaway Port Authority of Duluth v. Duluth-Superior ILA Marine Association Restated Pension Plan; and the Board of Trustees of the Duluth-Superior ILA Marine Association Restated Pension Plan*[4], 920 F.2d 503, 510 (8th Cir. 1990). The Court of Appeals' misapplication of existing case law from other circuits and its holding on the pre-emption question brings the Trustees to this Court.

REASONS FOR GRANTING THE WRIT

1. CONFLICT WITH THIS COURT'S ANALYSIS OF ERISA'S PRE-EMPTION CLAUSE.

In §514(a) of ERISA, as set forth in 29 U.S.C. §1144(a), Congress provided:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and

[4] Hereinafter referred to as *Seaway Port Authority of Duluth*.

> subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in §1003(a) of this title, and not exempt under §1003(b) of this title."

As this Court recently noted in *Ingersoll-Rand Company v. Perry McClendon*, 498 U.S. ___, 111 S.Ct. 478, 482, 112 L.Ed.2d 474, 483 (1990), "The key to §514(a) is found in the words 'relate to'." The Court, in *Ingersoll*, quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552-1553, 95 L.Ed.2d 39 (1987) then went on to state:

> " 'A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. *Shaw, supra*, at 96-97, 103 S.Ct., at 2900. Under this 'broad common-sense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Pilot Life, supra*, 481 U.S. at 47, 107 S.Ct., at 1552-1553." *Ingersoll, supra*, 111 S.Ct., at 483, 112 L.Ed.2d, at 484.

But this Court has also recognized that in order to be pre-empted by ERISA a state law should in some way "[R]equire the establishment or maintenance of an ongoing plan." *Ibid*, construing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 107 S.Ct. 2211, 2218, 96 L.Ed.2d 1 (1987). In *Fort Halifax*, the Court held that "Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*." *Id.*, at 11, 107 S.Ct., at 2217. It is significant that the focus in *Fort Halifax* was whether or not there even existed a benefit plan, and if there was, then the focus

would be on whether the effect of the state law related even indirectly to an employee benefit plan. *Shaw, supra,* 463 U.S. at 96-97, 103 S.Ct., at 2900.

The Minnesota state law relied on by the Court of Appeals below in support of its decision was §469.055(11) (Supp.1990)[5] which provides as follows:

> Subd. 11. TERMINAL OPERATORS FOR SEAWAY PORT. A seaway port authority may operate its port terminal facilities on its premises as terminal operators. If it does so, the authority may contract with a warehouse operator performing other terminal service to act as its agent. The contract may provide: (1) that the agent will be paid on a monthly basis to operate

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[5] Prior to its amendment by Chapter 291, Laws of Minnesota, 1987, §458.17, Subd. 8 read as follows:

> A seaway port authority may operate its port terminal facilities on its premises as terminal operators. If it does so, the authority may contract with a warehouse operator performing other terminal services to act as its agent. The contract may provide: (1) that the agent will be paid on a monthly basis to operate the facilities; (2) that the agent may hire the necessary personnel to carry out the functions undertaken by the contract; (3) that employees engaged by the agent are employees of the agent and not of the port authority; and (4) that the agent is responsible to pay the employees and to comply with local ordinances and state and federal laws affecting the employees. The seaway port authority may also contract with agents to perform any function that the port authority may do. The seaway port authority may retain power to set rates for a service to be performed in a terminal facility owned, leased, or operated by it.

Thus, for the period in question, this state law was virtually the same both before and after its amendment.

> the facilities; (2) that the agent may hire the necessary personnel to carry out the functions undertaken by the contract; (3) that employees engaged by the agent are employees of the agent and not of the port authority; and (4) *that the agent is responsible to pay the employees and to comply with local ordinances and state and federal laws affecting the employees.* The seaway port authority may also contract with agents to perform any function that the port authority may do. The seaway port authority may retain power to set rates for a service to be performed in a terminal facility owned, leased, or operated by it. (Emphasis added.)

The clear intent of this law was to allow SPAD to isolate itself from those laws (federal, state and local) dealing with employees by allowing it to contract out with a warehouse operator. There is no question that this law relates to and affects an employee benefit plan, as the Court of Appeals specifically found:

> Further supporting our decision is the nature of SPAD itself. As mentioned previously, SPAD, unlike any of the employers in the case law, is a creature of state law. One of the statutory provisions governing SPAD is Minn. Stat. Ann. §469.055 (11) (Supp., 1990), which delimits SPAD'S contractual powers with regard to managing agents. Those powers include the ability to specify that 'employees engaged by the agent are employees of the agent and not of the port authority,' and that the 'agent is responsible to pay the employees and to comply with- . . . federal laws affecting the employees.' *Id.* Article II of the various Managing Agent Agreements explicitly states that all operating personnel are employees of the Managing Agent. Hence, pursuant to the state statutory scheme,

> North Central, and not SPAD, must be considered the employer for purposes of the MPPAA. *Seaway Port Authority of Duluth*, 920 F.2d at 510.

The Court of Appeals below relied on a state law to interpret a federal statute even though this Court has already held that state laws that even indirectly affect a benefit plan are pre-empted by ERISA. *Shaw, supra*, 463 U.S. at 96-97, 103 S.Ct., at 2900, *Pilot Life, supra*, 481 U.S. at 47, 107 S.Ct., at 1552-1553, and *Fort Halifax, supra*, 482 U.S. at 12, 107 S.Ct., at 2215. Thus the Court of Appeals, by relying on a state law to support its decision that SPAD was not an employer for purposes of the MPPAA, not only placed itself in direct conflict with this Court's analysis of the scope of ERISA's pre-emption clause, but also ignored the clear command of Congress that ERISA and not state law governs employee benefit plans. It makes no difference that the MPPAA contains no definition of "employer." The point is that the Court of Appeals below was prohibited by precedent and Congressional intent from applying state law to a question clearly pre-empted by ERISA.

2. THE EIGHTH CIRCUIT'S DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH OTHER APPELLATE DECISIONS.

The Court of Appeals below held that as a condition precedent to finding SPAD an employer under the MPPAA, there had to be some contract signed by it that required SPAD to make pension contributions. *Seaway Port Authority of Duluth, supra*, at 510. In reaching that holding, the Court of Appeals drew upon the facts in other appellate decisions and concluded that in each case where an alleged employer was found to be a MPPAA

employer, there was some type of contractual obligation made by that employer to make pension contributions.

It is not disputed that the decisions cited by the Court of Appeals below in support of its analysis each found a contractual obligation on the part of the alleged employer to make contributions before concluding that it qualified as a MPPAA employer. In *Korea Shipping Corp. v. New York Shipping Ass'n – Int'l Longshoremen's Ass'n Pension Trust Fund*, 880 F.2d 1531 (2nd Cir. 1989), the alleged employer was held to be a MPPAA employer because it was a member of the New York Shipping Association (NYSA) and had also signed a general cargo agreement that obligated it to make tonnage assessments which were used in part to make pension plan contributions. Thus, the contractual obligation stemmed from two sources: (a) membership in the NYSA; and (b) the general cargo agreement which the alleged employer had actually signed.

In *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258 (2nd Cir. 1990) the alleged employer had not signed the general cargo agreement but was a member of the NYSA and had signed the general cargo agreement. The Second Circuit noted that the by-laws of the NYSA provided that its members would be bound by the general cargo agreement. As far as the Second Circuit was concerned, that was sufficient to find the alleged employer to be a MPPAA employer.

In *Philippines Micronesia & Orient Navigation Company v. N.Y.S.A. – ILA Pension Trust Fund*, 909 F.2d 39 (2nd Cir. 1990) (per curiam), *petition for cert. filed*, 59 U.S.L.W.

3295 (U.S. Oct. 3, 1990) (No. 90-576), the Second Circuit went one step further and held that membership in the NYSA was not in itself controlling because the evidence in that case revealed that the alleged employer's contract with its stevedore required it to make tonnage and job security program (JSP) assessments and container royalties called for in the labor agreement between the NYSA and the ILA. In addition, the alleged employer had also signed a separate agreement in which it subscribed to a collective bargaining agreement between the NYSA and the ILA including the provisions therein contained.

In *Carriers Container Council, Inc. v. Mobile S. & S. Ass'n, Inc. – Int'l Longshoremen's Ass'n, AFL-CIO Pension Plan and Trust*, 896 F.2d 1330, 904 F.2d 28 (11th Cir. 1990) *petition for cert. denied*, 111 S.Ct. 308 (U.S. October 15th, 1990) (No. 90-323), the fact that the alleged employer had signed a JSP agreement which contained language similar to that found in a general cargo agreement was enough for the Court to find that it was subject to withdrawal liability.

The reason why it was necessary for these courts to find a contractual obligation is because the MPPAA itself does not contain a definition of employer, and the definition of employer that has developed out of these decisions requires the finding of some obligation on the part of the alleged employer to contribute to an employee benefit plan. The focus in those decisions was whether the alleged employer had an obligation to make pension fund contributions, and evidence of that obligation was found in some sort of a written agreement signed by the alleged employer. And, as has been shown, this contractual obligation has been found to exist far beyond the

alleged employer's signatory status on a collective bargaining agreement calling for pension contributions.

The Appellate Court's analysis of those decisions in *Seaway Port Authority of Duluth* was correct, but the court failed to apply that analysis. It had before it sufficient documentation to find that SPAD had a contractual obligation to make pension contributions but chose instead to ignore that documentation.

Article III of the Managing Agent Agreements (E4) between SPAD and NORTH CENTRAL provided as follows:

> FUNDS
>
> All funds which are required for or arise out of the operations conducted by the Agent shall be deposited in an account or accounts in depositories to be designated by SPAD. Such accounts shall be designated 'North Central Terminal Operators, Inc., Managing Agent, Public Marine Terminal Division, Seaway Port Authority of Duluth'. All such funds shall be considered the property of SPAD and not of the Agent. SPAD will provide Agent with sufficient funds in said accounts to carry on the operations.
>
> Agent will have a separate bank account to be called a payroll account into which deposits will be made from the operating account above described in order to enable Agent to meet its payroll expenses and related fringe benefits. *ALL SUCH FUNDS SHALL CONTINUE TO BE THE PROPERTY OF SPAD UNTIL DISBURSED TO OR FOR THE ACCOUNT OF EMPLOYEES FOR PAYROLL EXPENSES AND RELATED FRINGE BENEFITS.* (Emphasis added.)

These facts demonstrate that SPAD was required by the contracts to pay all fringe benefit expenses required by collective bargaining agreements which would have to be funded. The Managing Agent Agreements between NORTH CENTRAL and SPAD provided that SPAD would control[6] and would be the owner of all funding as evidenced by the manner in which checks for the pension fund contributions were signed. All funds remained the property of SPAD until disbursed. The funds in question were never the property of the managing agent as evidenced by the clear wording of the agreements. SPAD had the obligation by contract with its agent to fund the pension plan. The last sentence in Article III (E5) makes this clear. The money used to pay the fringe benefits flowed directly from SPAD and was never under the control or ownership of the agent.

Further, this construction is conclusively supported by SPAD's financial records, including specifically its Statement of Income and Expense, Terminal Operations, Years Ending March 31, 1978 and 1977, Exhibit C, Schedule 2 (H4). See also, SPAD's Statement of Income and Expense, Terminal Operations, Years Ending March 31, 1982 and 1981, Exhibit G, Schedule 2 (I5) These statements and reports specifically treat pension payments as a direct expense of SPAD. The record provides conclusive proof that SPAD owned the funds used to fund the pension plan and that SPAD explicitly treated the pension plan payments as a direct expense in its financial statements.

The Court of Appeals below simply erred when it concluded that there was no contractual obligation on the part of SPAD to make pension contributions. Article III

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[6] *See*, Article VIII, Managing Agent Agreements. (E8)

(E4) of the various managing agreements makes it crystal clear that SPAD was required by those agreements to pay all fringe benefit expenses required by collective bargaining agreements. By choosing to ignore the record before it, the Court of Appeals placed itself squarely in conflict with the other appellate decisions. Not only was there ample evidence that SPAD was in fact the "contributing obligor" to make pension contributions, but in addition, the various Managing Agent Agreements clearly cried out for that conclusion.

3. NATIONAL IMPORTANCE OF THE CASE.

The decision by the Court of Appeals below gives the green light to any employer dealing with a multi-employer plan to circumvent the MPPAA by insulating itself from withdrawal liability in the manner as did SPAD. Now, such an employer can contract away its withdrawal liability by entering into an agreement with a third party for that purpose. The Court of Appeals below found nothing wrong with this: "There is nothing inherently improper in this, however, because parties may contract as they see fit, within certain limitations." *Seaway Port Authority of Duluth, supra,* at 510. The Fund's recourse, according to the Court of Appeals, is to chase the managing agent for the withdrawal liability. *See, Ibid.* But if the agent was insolvent, then both the plan and its participants would suffer while the real employer would escape liability completely. Because the record it reviewed did not involve an insolvent agent, the Court of Appeals below chose not to address that issue. *See, Ibid.*

To allow an employer to contract away its withdrawal liability obligation under the MPPAA to a third

party impairs Congress's purposes in passing the MPPAA. The reasoning of the Second and Eleventh Courts of Appeals in rejecting a common law definition of employer for purposes of the MPPAA is equally instructive as to why an employer should not be allowed to contract away its withdrawal liability by the use of an agent in the manner permitted by the Court of Appeals below. The Second Circuit Court of Appeals in *Korea Shipping, supra,* at 1536-1537, in deciding the definition of "employer" for purposes of the MPPAA, observed that:

> To apply a common law definition of employer to the MPPAA would encourage employers to insulate themselves contractually from liability by entering into agreements under which contributions to the pension plans would be made by entities that were not the direct employers of the plan's beneficiaries. Under such a scenario, the contributing indirect employer could terminate its relationship with the direct employer and thereafter withdraw from the plan without incurring withdrawal liability . . . At the same time, the direct non-contributing employer would also be absolved of withdrawal liability because it would not be deemed to have 'withdrawn from a multi-employer plan.'

Further, in *Carriers, supra,* at 1343, the Eleventh Circuit Court of Appeals on the same issue noted:

> The contributing obligor test drawn from Title I of ERISA furthers Congress's purposes in passing the MPPAA because it prevents a contributor to a plan from withdrawing its support without covering its share of unfunded liabilities. By sweeping in direct employers, indirect employers, intermediaries, and employer associations, the contributing obligor definition

> ensures that no employer can use intricate corporate structures to avoid withdrawal liability. See ERISA, §3(5), 29 U.S.C.A. §1002(5). We hold, therefore, that the contributing obligor definition drawn from Title I applies to the term 'employer' in §1381(a).

Unlike the Court of Appeals below, these Appellate Courts were concerned with the "Congressional policy of ensuring the financial stability of pension plans." *Ibid.* at 1343. Both of these Courts were afraid that, given an opportunity, an employer might contract away its withdrawal liability obligation. These Courts chose not to give an employer that opportunity whereas the Court of Appeals below did exactly the opposite.

Now, as a result of its decision in *Seaway Port Authority of Duluth*, the Court of Appeals below has slammed the door on the Congressional intent behind the passage of the MPPAA by allowing an employer to hire an agent to act in its stead with respect to collective bargaining agreements regarding payment of pension contributions. When the time comes to collect the withdrawal liability from that agent, that agent could be insolvent, resulting in a very real detriment to the fund and its participants. To prevent creating an opportunity for such a situation to occur is exactly the reason the Courts of Appeals in *Korea Shipping* and *Carriers Container* held as they did. This decision by the Court of Appeals below in *Seaway Port Authority of Duluth* has tremendous national repercussion because of the opportunity it has given an employer to avoid withdrawal liability.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Eighth Circuit.

Dated April 23, 1991.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5601MN

Seaway Port Authority of Duluth, Appellee, v. Duluth-Superior ILA Marine Association Restated Pension Plan; and The Board of Trustees of the Duluth-Superior ILA Marine Association Restated Pension Plan, Appellants.	* * * * * * * * * * * * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: September 12, 1990

Filed: November 30, 1990

Before WOLLMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

In this declaratory judgment action, the Duluth-Superior ILA Marine Association Restated Pension Plan and

its trustees (the Trustees) appeal from the district court's[1] order granting the Seaway Port Authority of Duluth's (SPAD) motion for summary judgment on the ground that SPAD was not an "employer" on or before May 28, 1987, for the purposes of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, and its amendment, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (1980). The Trustees argue on appeal that the district court erred in applying state law to determine whether SPAD was an employer under the federal statutes and also in determining that SPAD was not an employer under the federal statutes. Because the Authority was not an employer under the federal statutes, we need not decide the state law issue and thus affirm the district court's order.

I.

The Duluth-Superior ILA Marine Association Restated Pension Plan is a multiemployer pension plan. The Seaway Port Authority of Duluth is a public entity organized under Minn. Stat. Ann. §§ 469.048-469.107 (Supp. 1990). SPAD owns and operates the Arthur M. Clure Public Marine Terminal in Duluth, Minnesota. From 1977 until May 28, 1987, SPAD contracted with North Central Terminal Operators, Inc. to manage the terminal. Article I of the contracts[2] between SPAD and North Central

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[1] The Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

[2] North Central and SPAD signed seven Managing Agent Agreements in 1977, 1978, 1980, 1981, 1982, 1985 and 1987. All contain substantially the same or identical language.

provided that North Central would act as SPAD's managing agent for all terminal operations, including stevedoring, securing, cleaning, fitting, and berthing services. Article II of the contracts provided that North Central would be the employer of all operating personnel and that North Central would sign any collective bargaining agreements. Article III of the contracts provided that all funds needed for or arising from the terminal's operation would be deposited in accounts designated by SPAD. Article III further provided that North Central would maintain a separate payroll account into which SPAD would deposit funds from the operating account to enable North Central to meet its payroll and fringe benefit expenses. The checks for pension fund contributions were signed by both SPAD and North Central personnel.

On May 29, 1987, North Central ended its relationship with SPAD. Pursuant to ERISA § 4219, 29 U.S.C. § 1399(a), North Central completed a Statement of Business Affairs, supplying information about North Central's cessation of contributions to the pension plan. In the report, North Central contended that it never had an obligation to contribute to the pension plan, and thus denied any withdrawal liability.

On July 1, 1988, the Trustees notified SPAD that they believed North Central's termination constituted a complete withdrawal from the pension plan and that SPAD had incurred withdrawal liability under 29 U.S.C. § 1381. Section 4201 of ERISA, 29 U.S.C. § 1381, states in pertinent part: "(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal

liability." SPAD maintained that it was not an employer under the statute, that North Central was, and that SPAD thus was not liable for the withdrawal payments. SPAD and the Trustees agreed that SPAD would seek declaratory relief in federal district court to determine whether SPAD was an employer for the purposes of ERISA withdrawal.

SPAD filed its complaint for declaratory relief on October 6, 1988, and asked the court to determine whether it was an employer under ERISA, common law, or the MPPAA. The Trustees counterclaimed for a determination that SPAD was an employer under the federal statutes and the common law. Both parties then moved for summary judgment. The district court granted SPAD's motion for summary judgment and held that SPAD was not an employer under ERISA or the MPPAA on or before May 28, 1987, the date of North Central's termination. The Trustees now appeal this ruling.

II.

This is a matter of first impression in this circuit. Before discussing the parties' arguments, we will briefly describe the statutory scheme involved. Congress enacted ERISA in 1974 to "ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 720 (1984). To achieve this, Congress created the Pension Benefit Guaranty Corporation (PBGC), which insures certain pension plans and provides benefits to underfunded

plans upon termination. *Id.* After several years, the PBGC determined that ERISA did not sufficiently insulate plans from the adverse effects caused by the withdrawal of one employer from a multiemployer plan. *Id.* at 722. Responding to this concern, Congress amended Title IV of ERISA by enacting the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980). As one court has described the statute:

> The [MPPAA] added subtitle E to Title IV of ERISA. The MPPAA establishes withdrawal liability for employers that cease participation in a multiemployer pension plan, as well as means for computing that liability. Complete withdrawal from a multiemployer pension plan occurs when an employer either permanently ceases to have an obligation to contribute under the plan or permanently ceases all operations covered under the plan. . . . At the time that an employer withdraws from a plan, the plan is required by the MPPAA to determine the amount of the employer's withdrawal liability, and notify the employer of that amount.

Connors v. B.M.C. Coal Co., 634 F. Supp. 74, 75 (D.D.C. 1986) (citations omitted). In this case, the Trustees have determined that SPAD's alleged withdrawal liability is approximately $200,000.

The Trustees argue on appeal that the district court erred in holding that SPAD was not an employer for the purposes of ERISA and the MPPAA. They first argue that the district court improperly applied state common law in determining that SPAD was not an employer. It is impossible, however, to discern from the record what exactly were the grounds on which the district court based its decision. At the summary judgment hearing, the district

court remarked that to determine whether SPAD was an employer, it had to look to the Minnesota statute that established SPAD and to the existing law about the control of funds and employees. But the district court also addressed the Trustees' federal law arguments. In its subsequent order granting SPAD's summary judgment motion, the district court cited no authority and gave no reasons for its decision, but simply concluded that SPAD was not an employer under ERISA and the MPPAA. Regardless of the actual grounds on which the district court based its decision,[3] we review the Trustees'

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[3] We do note, however, that if the district court clearly had relied only on state common law to determine that SPAD was an employer under the MPPAA, we might have reversed its order. Courts may rely on state common law to decide some definitional questions under ERISA. For example, we have looked to state common law when determining whether someone is an "employee" under ERISA. *See Short v. Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567, 572-73 (8th Cir. 1984). Reference to common law to determine whether someone is an *employee* is usually justified by ERISA's lack of a workable definition: "We agree that because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency." *Penn v. Howe-Baker Eng'rs. Inc.*, 898 F.2d 1096, 1102 n.6 (5th Cir. 1990). The circuits that have addressed the definition of employer under ERISA and the MPPAA, however, have uniformly *rejected the use of state common law. See Phillippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39, 41 (2d Cir. 1990) (per curiam) ("[B]y now, it is well-established that the common law definition [of employer] does not control in cases such as this,. . . . "), *petition for cert. filed*, 59 U.S.L.W. 3352-53 (U.S. Oct. 3, 1990) (No. 90-576); *Carriers Container Council, Inc. v. Mobile S.S. Ass'n Inc.-Int'l Longshoreman's*

(Continued on following page)

arguments de novo because the definition of employer under the MPPAA is a question of law. *Cf. Short v. Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567, 571 (8th Cir. 1984) (stating that definition of employee under ERISA is a question of law).

The Trustees contend that the proper standard for determining whether SPAD is an employer is the definition found in ERISA: "The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relating to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." ERISA § 3(5), 29 U.S.C. § 1002(5). SPAD responds, correctly, that although ERISA defines an employer, the MPPAA does not. ERISA's definition of employer is contained in Title I of the statute. The withdrawal liability provision, however, is contained in Title IV of ERISA. This distinction is important because Title I's definitional section begins with the statement, "For purposes of *this* title: . . . . " ERISA § 3, 29 U.S.C. § 1002 (emphasis added). As the Supreme Court noted in *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980), terms defined in Title I of ERISA "are not necessarily applicable to Title IV, because they are limited by the introductory phrase, 'For purposes of this title,' " *id.* at 370, and "Title I definitions do

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Ass'n, AFL-CIO Pension Plan & Trust, 896 F.2d 1330, 1343 (11th Cir. 1990); *Connors v. P & M Coal Co.*, 801 F.2d 1373, 1377 (D.C. Cir. 1986); *cf. Scarbrough v. Perez*, 870 F.2d 1079, 1082-84 (6th Cir. 1989) (refusing to apply employer definition from Fair Labor Standards Act case law to ERISA).

not apply elsewhere in the Act of their own force." *Id.* at 370 n.14.

The Trustees reason that ERISA's broad definition nevertheless applies because it best effectuates the purpose of ERISA, which is to provide the maximum degree of protection to employees covered by private retirement plans. The Trustees do not draw this conclusion in a vacuum; several district courts have held that the ERISA definition of employer applies to the MPPAA. *See In re Uiterwyk Corp.*, 63 Bankr. 264, 266 (M.D. Fla. 1986); *Central Pa. Teamster's Pension Fund v. Service Group, Inc.*, 645 F. Supp. 996, 997 (E.D. Pa. 1985); *American Stevedoring Corp. v. Burlington Indus., Inc.*, No. 85-4180 (N.D. Ill. Dec. 19, 1985) (LEXIS, Genfed library, Dist file). More persuasive authority, however, holds otherwise. *See Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2d Cir. 1989); *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 879-80 (1st Cir. 1987), *cert. denied sub nom. New England Teamsters & Trucking Indus. Pension Fund v. Graff*, 484 U.S. 1064 (1988); *Glover v. SDR Cartage Co., Inc.*, 681 F. Supp. 1293, 1295 (N.D. Ill. 1988); *Connors v. B.M.C. Coal Co.*, 634 F. Supp. 74, 76 (D.D.C. 1986); *Connors v. Darryll Waggle Constr., Inc.*, 631 F. Supp. 1188, 1191 (D.D.C. 1986); *Combs v. Sun-Up Co., Inc.*, 634 F. Supp. 13, 15 (D.D.C. 1985).

In *DeBreceni*, the First Circuit rejected the same argument the Trustees ask us to accept, namely, that the Title I definition of employer applies to the MPPAA. The First Circuit reasoned that because the Title I definition is expressly limited to Title I, defining employer under Title IV is up to the courts. *DeBreceni*, 828 F.2d at 879-80. The circuit court then examined the MPPAA's purposes and

policy considerations to determine that controlling shareholders and officers were not employers under the statute. *Id.* at 880-81. The Second Circuit has also taken the position that because Title I definitions do not necessarily apply to Title IV, courts must define employer for the purposes of the MPPAA.[4] *Korea Shipping*, 880 F.2d at 1532. The District of Columbia Circuit has implicitly agreed. In *Connors v. P & M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986), the circuit court, without deciding the general applicability of Title I definitions to Title IV, determined that controlling shareholders were not employers under the MPPAA, *id.* at 1377, implying that it believes courts should decide who is an employer. We agree with our sister circuits and conclude that ERISA § 3(5), 29 U.S.C. § 1002(5), is not applicable to withdrawal liability under

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[4] Our characterization of the *Korea Shipping* opinion appears to conflict directly with the Eleventh Circuit's characterization of the same case in *Carriers Container Council, Inc. v. Mobile S.S. Ass'n Inc.-Int'l Longshoreman's Ass'n, AFL-CIO Pension Plan & Trust*, 896 F.2d 1330 (11th Cir. 1990). In *Carriers Container Council*, the Eleventh Circuit stated: "The *Korea Shipping* court held that the Title I definition of 'employer' should apply to the MPPAA. . . . " *Id.* at 1343. With all due respect to our sister circuit, that is not precisely what the Second Circuit held. After stating that courts should determine the MPPAA's definition of employer, the *Korea Shipping* court reviewed the MPPAA's policies and purposes and approved a definition of employer *based* on the definition found in Title I, but not the Title I definition itself. *Korea Shipping*, 880 F.2d at 1537. The Eleventh Circuit apparently recognized this distinction later in the *Carriers Container Council* opinion when it stated: "The contributing obligor test *drawn from* Title I of ERISA. . . . " *Carriers Container Council*, 896 F.2d at 1343 (emphasis added).

the MPPAA, and that the definition of employer under the MPPAA is for the courts to decide.

We next must determine the proper definition of an employer for the purposes of the MPPAA. We believe the purposes and policies underlying the MPPAA are best satisfied by the definition the Second Circuit proffered in *Korea Shipping*: "[T]he term employer in 29 U.S.C. § 1381(a) means 'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.' " *Korea Shipping*, 880 F.2d at 1537 (quoting district court's opinion in the same case, 663 F. Supp. 766, 770 (S.D.N.Y. 1987)); *accord Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 261 (2d Cir. 1990). The Eleventh Circuit has also adopted this definition. *See Carriers Container Council, Inc. v. Mobile S.S. Ass'n Inc.-Int'l Longshoreman's Ass'n. AFL-CIO Pension Plan & Trust*, 896 F.2d 1330, 1343 (11th Cir. 1990).

Although we now have a definition of employer, we still must determine what the definition means in this case. There is a paucity of case law applying this definition; what case law there is, however, supports SPAD's contention that it is not an employer under the MPPAA. The Second Circuit's analysis in the various cases makes clear that the appropriate inquiry is whether the alleged employer had an obligation to contribute and what was the nature of that obligation. In *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989), the alleged employers contended that they were not subject to withdrawal liability because under their collective bargaining

agreements they had no direct obligation to make pension contributions. *Id* at 1539. They had, however, signed a General Cargo Agreement (GCA) that obligated them to pay tonnage assessments to the New York Shipping Association (NYSA), which in turn used part of those fees to make pension plan contributions. The alleged employers argued that the fees were not "obliged contributions" to the pension plan, and that it was the NYSA that was obligated to contribute. The Second Circuit disagreed, responding: "The fact that the NYSA was the party that transferred the monies to the Fund is irrelevant." *Id*. The court pointed out that the GCA explicitly stated that the employers were responsible for the fees that the direct employers would collect and pay to the NYSA. *Id*. The GCA also explicitly stated that the NYSA would then make direct contributions to the pension plan. *Id*. the Second Circuit concluded: "These *contractual provisions* amply support the conclusion that the [direct employers] and the NYSA were merely conduits for monies which the carriers were obligated to pay into the longshoremen's pension fund." *Id*. (emphasis added).

In *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258 (2d Cir. 1990), the Second Circuit dealt with an issue arising from its *Korea Shipping* decision, namely, whether an alleged employer who has not signed the GCA is still subject to withdrawal liability. The alleged employer in *Bowers* was a member of the NYSA and had paid the required tonnage assessments, but had never signed the GCA. The *Bowers* court noted that if the employer had actually signed the GCA, its liability would be indisputable. *Id*. at 262. But the fact that the employer had not signed the GCA did not preclude a finding of

withdrawal liability because the NYSA, of which the employer was a member, had signed the GCA. *Id.* The NYSA's by-laws provided that all members would be bound by such an agreement unless they objected in writing, which the alleged employer had not done. *Id.* The alleged employer contended that the by-laws did not bind it because it had never expressly ratified them. The Second Circuit rejected this argument, stating that the employer had ratified the NYSA by-laws by paying the tonnage assessments and signing the NYSA's membership application. *Id.* The only way the employer could have avoided its obligations under the NYSA, the Second Circuit concluded, was by repudiating the GCA and the NYSA memberships, which it failed to do. *Id.*

Most recently, the Second Circuit held an alleged employer subject to withdrawal liability where it contractually agreed to pay tonnage assessments to the NYSA and had signed a separate agreement in which it subscribed to the collective bargaining agreement between the NYSA and the longshoremen's union. *Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39, 41 (2d Cir. 1990) (per curiam), *Petition for cert. filed*, 59 U.S.L.W. 3352-53 (U.S. Oct. 3, 1990) (No. 90-576).

One other circuit has adopted the Second Circuit's withdrawal liability analysis. Relying heavily on the Second Circuit's *Korea Shipping* decision, the Eleventh Circuit in *Carriers Container Council, Inc. v. Mobile S.S. Ass'n Inc.-Int'l Longshoreman's Ass'n, AFL-CIO Pension Plan & Trust*, 896 F.2d 1330 (11th Cir. 1990), held that an entity was subject to withdrawal liability because, on the basis of its contractual obligations, it was an employer under the

MPPAA. *Id.* at 1344. The entity in that case, the Carriers Container Council (CCC), was an association of shipping companies that signed contracts with various unions to set up a Job Security Program (JSP). The JSP was the result of an earlier labor dispute about declining pension contributions due to the modernization of the shipping industry. The JSP agreements provided that the individual carriers would pay a tonnage assessment that the CCC would hold in a fund and use to cover shortfalls in pension contributions. The Eleventh Circuit emphasized the similarity between the JSP agreement, which stated that the CCC must collect tonnage assessments, place them in an account, and then pay out funds as needed to cover pension plan shortfalls, and the GCA in *Korea Shipping*, concluding that "CCC is clearly a contributing obligor." *Id.* CCC argued that because it had not signed all of the union contracts, it had no obligation to contribute. The Eleventh Circuit disagreed, finding that the JSP agreement and the various union contracts were "interrelated collective bargaining agreements." *Id.* The court also noted that even if CCC was not a direct party to some of the coal union contracts, it still was obligated under the JSP agreement. *Id.*

Before the Second Circuit's decision in *Korea Shipping*, the Ninth Circuit had addressed the issue of the proper definition of employer under the MPPAA in *H.C. Elliot, Inc. v. Carpenters Pension Trust Fund*, 859 F.2d 808 (9th Cir. 1988), a case neither party cites. In *H.C. Elliot*, the employer argued that it was not subject to withdrawal liability under the MPPAA because it was not a direct employer, but rather subcontracted its work. *Id.* at 812. The Ninth Circuit found this distinction specious, noting

that the withdrawal statute did not require direct employment. *Id.* at 813. The Circuit court then stated: "The word 'employer' describes one who [is] a *signatory employer* with respect to the [pension] plan." *Id.* (emphasis added). Because the employer's subcontractors continued to perform work covered by the collective bargaining agreement the employer had signed, it was subject to withdrawal liability. *Id.*

This review of the relevant case law reveals one fact common to all of the parties held subject to withdrawal liability: *they were contractually bound to make pension contributions,* either in collective bargaining agreements, general cargo agreements, or shipping association agreements. *Cf. also Laborers Local 938 v. B.R. Starnes Co.,* 827 F.2d 1454, 1456-57 (11th Cir. 1987) (per curiam) holding that ERISA's definition of employer does not include persons other than signatory employers). In this case, it is undisputed that SPAD did not sign any collective bargaining agreements. Nor did it sign a shipping association agreement. Nor did SPAD sign the pension plan's trust agreement that established the contribution duty during the relevant period. Our review of the record does not reveal any contracts SPAD signed explicitly obligating it to make pension contributions.[5] Thus, applying the

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[5] The only possible contractual provisions the Trustees could cite are found in Article III of the various Managing Agent Agreements. The relevant provisions state: "SPAD will provide Agent with sufficient funds in said accounts to carry on the operations. Agent will have a separate bank account to be called a payroll account into which deposits will be made from the operating account . . . to enable Agent to meet its

(Continued on following page)

relevant case law, SPAD is not obligated to contribute and is not an employer under the MPPAA.

Further supporting our decision is the nature of SPAD itself. As mentioned previously, SPAD, unlike any of the employers in the case law, is a creature of state law. One of the statutory provisions governing SPAD is Minn. Stat. Ann. § 469-055(11) (Supp. 1990), which delimits SPAD's contractual powers with regard to managing agents. Those powers include the ability to specify that "employees engaged by the agent are employers of the agent and not of the port authority," and that "the agent is responsible to pay the employees and to comply with- . . . federal laws affecting the employees." *Id.* Article II of the various Managing Agent Agreements explicitly states that all operating personnel are employees of the Managing Agent. Hence, pursuant to the state statutory scheme, North Central, and not SPAD, must be considered the employer for the purposes of the MPPAA.

(Continued from previous page)

payroll expenses and related fringe benefits." The first provision mentions nothing about pension funds and thus does not create an obligation to contribute. The second provision similarly does not mention pension contributions, although its does mention "fringe benefits." This reference to "fringe benefits," however, does not establish an obligation to contribute to a pension plan. *See Containers Carrier Council*, 896 F.2d at 1344 (stating that withdrawal liability is based on the obligation to contribute to plan "and not on the basis of benefits that the employer promised to supply to plan participants"). Moreover, the second provision clearly states that payroll expenses and fringe benefits are North Central's responsibilities, not SPAD's.

The Trustees contend that our requiring an entity to sign a contract explicitly obligating it to provide pension contributions before the entity is an "employer" under the MPPAA would defeat the purpose of ERISA. They argue that true employers will simply require their managing agents to sign all relevant agreements, and then claim no obligation to contribute when the agent withdraws. There is nothing inherently improper in this, however, because parties may contract as they see fit, within certain limitations. A pension plan's proper recourse in such a situation is to assess withdrawal liability against the managing agent. The Trustees further argue that true employers may hire insolvent sham agents, require them to sign all agreements, and thus avoid withdrawal liability. We are not faced with such a situation in this case. There is no evidence in the record that North Central is insolvent. In its Statement of Business Affairs, North Central stated it was not undergoing any bankruptcy proceedings, was not subject to any dissolution proceedings, and was not transferring its assets. Nor is there any evidence that SPAD hired North Central for any improper purpose.[6] Because the case of an insolvent shell agent and a potentially fraudulent arrangement is not properly before us, we leave that issue for another day.

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[6] In fact, the statute that created SPAD explicitly permits it to hire a managing agent. *See* Minn. Stat. Ann. § 469.055(11) (Supp. 1990).

III.

For the foregoing reasons, we hold that SPAD is not an employer under the MPPAA because it was not obligated to contribute to the pension plan. Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5601MN

Seaway Port Authority of Duluth, Appellees, v. Duluth-Superior ILA Marine Association Restated Pension Plan, et al., Appellants.	*	Appeal from the United States District Court for the District of Minnesota

Appellant's petition for rehearing has been considered by the court and is denied.

January 23, 1991

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
FIFTH DIVISION
DISTRICT OF MINNESOTA

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Seaway Port Authority of Duluth,

Plaintiff,

v.

Duluth-Superior ILA Marine Association Restated Pension Plan, and the Board of Trustees of the Duluth-Superior ILA Marine Associated Restated Pension Plan

Defendants.

Civ. 5-88-199

ORDER FOR SUMMARY JUDGMENT AWARDING DECLARATORY RELIEF

FILED
OCT 05 1989

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The above matter came on for hearing before the Honorable Robert G. Renner at the U.S. District Court, St. Paul, Minnesota, on September 27, 1989, upon Plaintiff's Motion for Summary Judgment and for Declaratory and Injunctive Relief and upon Defendants' cross Motion for Summary Judgment. Robert C. Maki of Counsel with Halverson Watters Bye Downs & Maki, Ltd., appeared for Plaintiff, and Kenneth Butler and David Michaelson of Van Evera, Clure, Butler & Michaelson, P.A. appeared for Defendants. The parties presented Plaintiff's Motion for Summary Judgment and for Declaratory and Injunctive Relief and the Defendants' cross Motion for Summary Judgment. The Court, having fully considered the matter

and being duly advised in the premises, denies Defendants' Motion for Summary Judgment, and grants Declaratory Relief as to that part of Plaintiff, the Seaway Port Authority of Duluth's Motion seeking an interpretation of the statutory definition of the term "employer" and finds that Plaintiff is entitled to Summary Judgment as a matter of law as follows:

The Seaway Port Authority of Duluth is not an "employer" for purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") Pub. L. No. 93-406, 29 U.S.C. §1001 et seq., and its amendment the Multi-employer Pension Plan Amendments Act of 1980 ("MPPAA") Pub. L. 96-364, 29 U.S.C. §1381 et seq.

This case is dismissed in its entirety with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 3, 1989.

BY THE COURT

/s/ Robert C. Renner
Honorable Robert C. Renner
U.S. District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Seaway Port Authority
of Duluth,

Plaintiff,

vs.

Duluth-Superior ILA
Marine Association Restated
Pension Plan, and the Board
of Trustees of the Duluth-
Superior ILA Marine Association
Restated Pension Plan

Defendants.

ORDER
Civ. 5-88-199

Filed
NOV 21 1989

Before the Court is defendants' motion to correct a clerical error pursuant to Fed. R. Civ. P. 60(a), and motion to amend the judgment pursuant to Rule 59(e). The Court's Order in this matter, dated October 3, 1989, states:

> The Seaway Port Authority of Duluth is not an 'employer' for purposes of the Employee Retirement Income Security Act ("ERISA") . . . .

Defendants correctly note that the issue before the Court was whether plaintiff was an employer for purposes of ERISA on or before May 28, 1987.

Accordingly, IT IS HEREBY ORDERED that the Court's Order of October 3, 1989 is corrected *nunc pro tunc* to state:

> The Seaway Port Authority of Duluth was not an 'employer' for purposes of the Employee

> Retirement Income Security Act ("ERISA") . . . and its amendment the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") . . . on or before May 28, 1987.

IT IS FURTHER ORDERED that defendants' motion to amend the judgment is denied.

DATED: November 20, 1989.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX E

MANAGING AGENT AGREEMENT

THIS AGREEMENT, Made this 1st day of March, 1977, between SEAWAY PORT AUTHORITY OF DULUTH, a body politic and corporate, hereinafter referred to as "SPAD", and NORTH CENTRAL TERMINAL OPERATORS, INC., hereinafter referred to as "Agent".

RECITALS:

1. Agent has proposed to SPAD a Managing Agent Agreement which will encompass a broader scope of activities and responsibilities than previous managing agents for SPAD.

2. Agent proposes to have, as managing agent, full responsibility for managing all berths under SPAD control, including nonoperating berths.

3. Agent proposes to fulfill all operating functions of the SPAD facility, including stevedoring, securing, cleaning and fitting.

4. Agent proposes that, should SPAD desire to have Agent fulfill limited promotional functions for SPAD, Agent will perform such at SPAD's direction under terms which are mutually agreed upon between the parties.

5. Agent commits to SPAD that it will not carry out any operations for its own account at the Arthur M. Clure Public Marine Terminal in the City of Duluth, Minnesota, hereinafter referred to as "the Facility".

WITNESSETH:

WHEREAS SPAD operated the Facility under the pursuant to the powers granted to it under and pursuant to M.S.A. Chapter 458; and

WHEREAS SPAD desires to operate the Facility through a managing agent in accordance with the provision of M.S.A.

Section 458.17 for the period March 1, 1977, to March 31, 1978,

NOW, THEREFORE, IT IS AGREED as follows:

ARTICLE I

DUTIES

Agent, under the supervision and with the cooperation of the Director of the Port of SPAD (hereinafter sometimes referred to as "Director"), will act as managing agent for SPAD with respect to all operations at the Facility, including the Container Crane, subject to exceptions set forth in this Article, for the period March 1, 1977, to March 31, 1978. Agent will manage all stevedoring, securing, cleaning and fitting, car and truck loading and unloading functions and will perform all other operating functions of the Facility. Agent will have no responsibilities with respect to any other areas of operation at the Facility, nor elsewhere, which are not specifically provided for in this Agreement. Agent will be required to coordinate all phases of the operation of the Facility and to conduct the operations of SPAD so as not to interfere with the rights of SPAD lessees at the Facility. Specific activities with respect to which Agent will have limited responsibilities are as follows:

1. The Agent will perform all services at all berths, including nonoperating mooring berths, except that services at all berths, including operating mooring berths, such as cleaning and fitting, can be performed by stevedores other than the Agent if such services of stevedores

other than the Agent are required for preparing vessel for loads at any other facility by the ship agent, the charterer or owner, with the prior consent of the Director and provided that such cleaning and fitting services do not interfere with SPAD's cargo loading and unloading services. For purposes of this Article, the phrase "nonoperating mooring berths" shall include any berth at which a ship is moored for purposes other than to receive or discharge cargo.

2. Areas presently under lease, or which may come under lease during the term of this Agreement, including the areas leased to Mid-Continent Warehouse Company, United Parcel, Inc., American Hoist & Derrick Company, Bay Front Marine, Inc., Seaway Services Inc. and Upper Great Lakes Pilots Association.

ARTICLE II

PERSONNEL

1. All operating personnel required to carry on the functions referred to in Article I shall be the employees of Agent, working at the risk of and for the account of the Agent. Agent shall have the responsibility for arranging for the employment of all operating personnel, and Agent, in the interest of continuity of operations, has agreed to initially employ all employees, if said employees so choose, of the prior managing agent, except for the superintendent and manager positions.

2. Agent shall propose in writing as an attachment to this Agreement persons to carry on the functions of superintendent and manager to direct the operations of

the Facility and persons to fill the additional key posts. Agent shall also propose the terms and conditions of the employment of the superintendent and the key personnel. All of these persons and the terms and conditions of their employment shall be subject to the approval of SPAD, who shall also be considered employees of the Agent.

3. The Director of Finance employed by SPAD shall act as accountant for Agent and will be expected to divide his time and efforts approximately as follows:

60% with respect to Agent's areas of responsibility;

40% to SPAD;

The salary and related employment expenses of the Director of Finance shall be allocated for accounting purposes in the proportions above stated.

4. Only those persons acceptable to SPAD under a certification procedure mutually agreeable to the parties to this Agreement will be permitted to operate the Container Crane and the Gantry Cranes located at the Facility.

ARTICLE III

FUNDS

All funds which are required for or arise out of the operations conducted by the Agent shall be deposited in an account or accounts in depositories to be designated by SPAD. Such accounts shall be designated "North Central Terminal Operators, Inc., Managing Agent, Public Marine Terminal Division, Seaway Port Authority of

Duluth". All such funds shall be considered the property of SPAD and not of the Agent. SPAD will provide Agent with sufficient funds in said accounts to carry on the operations.

Agent will have a separate bank account to be called a payroll account into which deposits will be made from the operating account above described in order to enable Agent to meet its payroll expenses and related fringe benefits. All such funds shall continue to be the property of SPAD until disbursed to or for the account of employees for payroll expenses and related fringe benefits.

ARTICLE IV

TARIFFS

Agent shall propose to SPAD a schedule of tariffs for all services to be rendered in connection with operation of the Facility. Final authority for setting all rates and charges will meet with SPAD, which will give reasonable consideration to all recommendations from Agent. The Director will cooperate with the Agent in making permissible adjustments to discretionary charges and tariffs, and any adjustment shall only be made after the express written permission of the Director. The parties will cooperate to insure performance of the requirements of all regulatory bodies affecting facility operations.

ARTICLE V

PERFORMANCE AND MAINTENANCE

Agent shall perform its duties under this contract in a workmanlike manner and with reasonable diligence in

a way designed to promote the maximum flow of commerce through the Port of Duluth. All mechanical equipment shall be maintained in good working condition. Proper maintenance procedures with respect to the Container Crane and the Gantry Crane shall be established which are satisfactory to SPAD. Scheduling of all such maintenance procedures shall be submitted in advance to SPAD for approval. Routine annual maintenance expense shall be allocated to the year incurred. Major items of maintenance expense are subject to negotiation between the parties as to whether to be allocated to the year incurred or to be spread out over several years. The standard of maintenance to be observed is such as would be followed by the ordinarily prudent operator who was himself the owner of the Facility.

ARTICLE VI

CONTRACTS FOR GOODS AND SERVICES

Agent may contract for goods and services, other than personnel employed in accordance with Article II, only on approval of the Director or his designee. The term "goods and services" as used in this Article shall include the purchase of insurance. All such contracts shall clearly indicate the principal-agency relationship existing between SPAD and Agent and shall comply with all statutes and regulations dealing with purchases by SPAD as a body politic and corporate created under Chapter 458, Minnesota Statutes. In the event that it is necessary or economically feasible that the purchase of insurance for federal or state compensation insurance

purposes or for stevedores' liability or other similar purchases be combined with the purchase of such insurance on operations conducted by the Agent elsewhere than at the Facility, such purchases shall be made only with the advance approval of the Director or his designee and on condition that all parties to the transaction, including the insurance companies involved, agree to allocate the cost among the various locations to the end that SPAD will only pay for costs incurred in connection with operating the Facility.

ARTICLE VII

FEE

Agent will be paid a fee for services rendered as managing agent based on the net income of terminal, tank farm and Container Crane operations for the one (1) fiscal year of this contract, commencing April 1, 1977, and ending March 31, 1978. The audit report for the fiscal year ending March 31, 1976, prepared by Stillman & House, Certified Public Accounts, is hereby incorporated in this Agreement by reference. Net income for purposes of determining the Agent's fee will be based upon the method of accounting reflected in that audit report and, particularly, beginning at Exhibit "C" thereof, page 22. Net income for purposes of determining the Agent's fee shall be calculated prior to deducting the Agent's fee. Building depreciation shall be calculated at Eighty Thousand and No/100ths Dollars ($80,000.00) per year, tank farm structures depreciation shall be calculated at the rate of Twenty Thousand and No/100ths dollars ($20,000.00) per year and depreciation of the Container

Crane shall be calculated at zero (0) for purposes of this Agreement. Some of the equipment depreciation referred to in Exhibit "A", particularly with respect to fork lifts, is based on replacement costs.

Agent will receive a fee for the period April 1, 1977, to March 31, 1978, as follows:

> Agent will be guaranteed a fee of Ten Thousand and No/100ths Dollars ($10,000.00) if the Facility is operated at a loss or for all net income from the operations covered by this Agreement from zero (0) to One Hundred Thousand and No/100ths Dollars ($100,000.00); additionally, fifteen percent (15%) of all net income between One Hundred Thousand and No/100ths Dollars ($100,000.00) and Two Hundred Thousand and No/100ths Dollars ($200,000.00); additionally, twenty percent (20%) of all net income over Two Hundred Thousand and No/100ths Dollars ($200,000.00). The basic fee of Ten Thousand and No/100ths Dollars ($10,000.00) shall be paid monthly at the end of each month. Additional fees shall be paid quarterly to the extent that SPAD, in its sole discretion, shall determine to be due and owing at the end of the employment term.

The compensation to be paid said Agent shall be reviewed by SPAD every ninety (90) days in accordance with the provisions of the Bylaws.

ARTICLE VIII

CONTROL

Agent shall be under the authority of and subject to the direction of the Board of Commissioners of SPAD as

set forth in duly adopted resolutions of such Commissioners.

SPAD's director shall exercise such authority and control consistent with the resolutions of the Board in the periods between Board meetings.

The parties agree to review all expenditures each month so that effective cost control can be maintained. Monthly reports will be prepared and submitted to SPAD no later than the tenth of each succeeding month.

All notices involving civil litigation or administrative proceedings of any kind received by Agent shall be referred immediately to the Director. Except as to controversies between SPAD and Agent, control of all such litigation arising out of or related to operation of the Facility shall be retained by SPAD.

ARTICLE IX

INDEMNIFICATION AND INSURANCE

Agent shall indemnify and hold SPAD harmless of and free from any loss; personal injury, death or other damages that may be done to or suffered by any concern or persons, including employees of Agent, in connection with or arising out of the performance of the Agent contract. This shall apply to all cases of loss, personal injury, death or other damages, including cases of loss, personal injury, death or other damages for which either or both of the parties to the agreement shall be liable. Agent shall insure against the contractual obligation contained in this Article with appropriate contractual insurance coverage in an amount not less than One Million

and No/100ths Dollars ($1,000,000.00) and shall provide proof of such coverage to SPAD.

All insurance required on this Article IX shall be taken out and maintained in responsible insurance companies licensed to do business in Minnesota. The Agent will deposit with SPAD policies evidencing all such insurance, or a certificate or certificates of the respective insurer stating that such insurance is in force and effect. Each policy shall contain a provision that the insurer shall not cancel it, or reduce or limit the scope or limits of coverage thereunder, without giving written notice to SPAD at least thirty (30) days before the cancellation or change becomes effective. To the extent necessary to affect the purposes of this Article, SPAD shall be named as an insured under the policy. Before the expiration of any policy, the Agent shall furnish SPAD evidence satisfactory to SPAD that the policy has been renewed or replaced by another policy conforming to the provisions of this Article. The Agent's obligations to secure and maintain insurance hereunder shall be in addition to and shall not limit any other obligation assumed by the Agent under the terms of this Agreement. SPAD does not in any way represent that the insurance specified herein, whether in scope of coverage or limits, is adequate or sufficient to protect the Agent's business or interests. Where special or unusual hazards peculiar to the performance of the contract are foreseeable, the Agent shall take such steps to insure itself and SPAD against such hazards and shall be responsible for any damage which results from the occurrence of such hazard.

ARTICLE X

TERMINATION

SPAD may terminate this Argument at any time that it determines that circumstances have developed making it unfeasible for Agent to carry out its duties, having due regard to the public interest in promoting port development and trade. The following list of circumstances is intended by way of example and not as the exclusive basis for such a determination by SPAD:

1. Unsatisfactory performance of the duties of Agent.
2. Specific violation of this Agreement.
3. Fraud, theft or other forms of dishonesty.
4. A generally unfavorable reputation, tending to bring SPAD into disrepute.
5. A change in ownership, control or management of Agent.
6. Statutory changes depriving SPAD of a right to engage an Agent.

SPAD shall give reasonable notice to Agent, together with an opportunity to be heard, before making any determination as provided herein. If, after such a hearing, the Board of Commissioners of SPAD finds that such circumstances have in fact developed as to make it unfeasible for Agent to continue to carry out its duties as managing agent, the contract may be terminated on thirty (30) days' written notice directed to Agent at its last-known address.

If Agent disputes the findings and determination of the Board of Commissioners, the issue shall be settled by

arbitration in accordance with the provisions of the Minnesota Uniform Arbitration Act. In such an event, the parties will join in requesting the court to appoint an arbiter or arbiters who have a background in port promotion or administration.

ARTICLE XI

This Argument is for all legal purposes to be considered as having been executed at Duluth, Minnesota. All disputes arising hereunder shall be determined by reference to Minnesota law.

SEAWAY PORT AUTHORITY
OF DULUTH

By /s/ John W. Sheedy
Its President

By /s/ Fred C. Barrett
Its Secy.

NORTH CENTRAL TERMINAL
OPERATORS, INC.

By /s/ Davis Helberg
Its President

By /s/ Jennifer D. Broome
Its Secretary

APPENDIX F

SEAWAY PORT AUTHORITY OF DULUTH
MINNESOTA'S WORLD PORT

1200 PORT TERMINAL DRIVE
P.O. BOX 16877
DULUTH, MINNESOTA 66816-0077 U.S.A.
218/727-8525/CABLE 'SPAD'/TWX 910-561-0057

TO: Maritime Interested Parties

FROM: Davis Helberg

DATE: June 5, 1987

MEMO

This is to advise that, until further notice, the Arthur M. Clure Public Marine Terminal (the "Port Terminal") in Duluth is being operated by the Seaway Port Authority of Duluth.

North Central Terminal Operators, Inc., which managed the Port Terminal facilities for several years, has terminated its operation agreement with the Seaway Port Authority.

The Port Authority has established a Public Marine Terminal Division to manage all stevedoring, warehousing and maintenance operations. The terminal management team is comprised of:

* Thomas E. Kennedy, general manager
* Tom Privette, operations manager
David L. Sauer, property superintendent
Denise M. Sazama, office manager

The address, telephone numbers, TWX and FAX (218-727-6888) numbers previously used in North Central's name will continue unchanged.

Any agreements or other business arrangements in effect with North Central will remain intact because the company at all times operated solely as a managing agent on behalf of the Seaway Port Authority.

DH/bj

APPENDIX G

LAW OFFICES
VAN EVERA, CLURE, BUTLER & MICHELSON, P.A.
SUITE 1400 ALWORTH BUILDING
306 WEST SUPERIOR STREET
DULUTH, MINNESOTA 55802-1894

July 1, 1988

North Central Terminal Operators, Inc.
Seaway Building
802 Garfield Avenue
Duluth, Minnesota 55802

ATTN: Mr. Christopher R. Juntunen
Corporate Secretary

Seaway Port Authority of Duluth
c/o HALVERSON, WATTERS,
BYE, DOWNS & MAKI, LTD.
700 Providence Building
Duluth, Minnesota 55802

ATTN: Mr. Robert Maki, Esq.

RE: Duluth-Superior ILA Marine Association Restated Pension Plan Our File No. 986.5091

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Gentlemen:

This letter constitutes notification of liability and demand for payment of such liability pursuant to Section 4219 of the Employee Retirement Income Security Act of 1974, as amended (ERISA). This notification and demand for payment is made by the Board of Trustees (the "Trustees") of the Duluth-Superior ILA Marine Association Restated Pension Plan (the "Pension Plan") and directed to the Seaway Port Authority of Duluth and North Central Terminal Operators, Inc., collectively

referred to as the "Employer," at the time of the Employer's complete withdrawal from the Pension Plan on May 29, 1987.

The Trustees of the Pension Plan have learned that on or about May 27, 1987, North Central Terminal Operators, Inc. terminated its relationship with the Seaway Port Authority of Duluth which resulted in a cessation of the Employer's obligation to contribute to the Pension Plan and/or permanently ceasing all covered operations under the Pension Plan up to that date. Accordingly, the Trustees have determined that the Employer has effected a complete withdrawal from the Pension Plan within the meaning of Section 4203(a) of ERISA, and has incurred a withdrawal liability to the Pension Plan, as prescribed by Section 4201 of ERISA.

This withdrawal liability represents a joint and several obligation of North Central Terminal Operators, Inc. and the Seaway Port Authority of Duluth which retained a significant level of involvement in the management of the Duluth port during its relationship with North Central Terminal Operators, Inc.

Therefore, notice and demand for payment of the withdrawal liability hereinafter described hereby is made, both individually and jointly, on North Central Terminal Operators, Inc. and the Seaway Port Authority of Duluth.

The amount of the Employer's withdrawal liability to the Pension Plan is $199,652.00. This amount was determined under the so-called presumptive method for computing withdrawal liability which is described in Section

4211(b) of ERISA, and the determination itself is shown in the attached Exhibit A.

Based upon the actuarial assumptions used by the Pension Plan and the method of payment described in Section 4219(c) of ERISA, the amount of the Employer's withdrawal liability specified above should be paid to the Pension plan, in accordance with the following installment schedule:

Due Date of Installment	Amount of Installment
September 1, 1988	$ 37,564.00
December 1, 1988	37,564.00
March 1, 1988	37,564.00
June, 1989	37,564.00
September 1, 1989	37,564.00
December 1, 1989	11,832.00

Payment of the Employer's withdrawal liability in accordance with the pregoing installment payment schedule is subject to the following conditions:

1. If any installment payment is not made when due, interest (at a rate determined by the Trustees in accordance with prevailing market rates for comparable obligations) on that installment payment will accrue from its due date until the date on which payment is actually made.

2. In the event of a default, as hereafter defined, the total outstanding amount of the Employer's withdrawal liability automatically shall become immediately due and payable in full, without notice or demand by the Trustees. In addition, interest (at a rate determined by the Trustees in accordance with prevailing market rates for comparable obligations) will accrue on

the total outstanding amount of the Employer's withdrawal liability from the earlier of (i) the date of default or (ii) the due date of the first installment payment which was not timely made, until the date on which payment of such amounts is actually made. As used herein, default means (i) the Employer's failure to make any installment payment (or to pay accrued interest thereon) when due if such failure is not corrected within 60 days after the Trustees notify the Employer in writing of such failure, or (ii) any other event define in rules heretofore or hereafter adopted by the Trustees which indicates a substantial likelihood that the Employer will be unable to pay its withdrawal liability.

3. The Employer may prepay the outstanding amount of its withdrawal liability, plus accrued interest, in any, in whole or in part, without penalty.

4. Payment of the Employer's withdrawal liability must be made in accordance with the installment payment schedule set forth above notwithstanding any request for review or appeal by the Employer of the Trustees' determinations regarding the amount of such liability or the schedule for paying such liability.

Within ninety (90) days after receiving this letter, the Employer may submit to the Trustees in writing (i) a request that the trustees review any specific matter relating to the determination of the Employer's liability and the schedule of payments, (ii) a statement identifying any inaccuracy in the Trustees' determination of the amount of unfunded vested benefit liability allocated to the Employer, and (iii) any additional relevant information. The Trustees will conduct a reasonable review of any matter raised by the Employer in this manner and will

notify the Employer, in writing, of its conclusions following such review. In the absence of a timely written request for review by the Employer, the Trustees' determinations regarding the amount of the Employer's withdrawal liability and the schedule for paying such liability, as set forth above, shall be final and binding upon all interested parties.

Pursuant to ERISA Section 4221, any dispute arising out of the Pension Fund's determination and review must be resolved through arbitration. Either party may initiate the arbitration proceedings herein with a 60-day period after the earlier of (a) the date of the Fund's notice of findings and determination after any review; or (b) 120 days after the date of the Firm's request under Section 4219(b)(2) of ERISA.

Notwithstanding any request for review, arbitration or possible future adjustments, however, payments demanded herein must commence in accordance with the terms and schedule set forth above. ERISA Section 4219(c)(2).

All payments of the Employer's withdrawal liability should be made payable to the Pension Plan and should be submitted to the office of the Pension Plan at 2902 West Third Street, Duluth, Minnesota 55806. Any request for review or other written materials to be submitted to the Pension Plan or the Trustees should be forwarded to the following, who is counsel to the Pension Plan and the Trustees:

Kenneth D. Butler
VAN EVERA, CLURE, BUTLER & MICHELSON, P.A.
1400 Alworth Building
306 West Superior Street
Duluth, Minnesota 55802

Yours truly,

BOARD OF TRUSTEES OF THE DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN

By: /s/ Kenneth D. Butler
Kenneth D. Butler

cc: Ms. Carman Bates

KDB/mm

APPENDIX H

Seaway Port Authority of Duluth
Duluth, Minnesota

STATEMENT OF INCOME AND EXPENSE
TERMINAL OPERATIONS

Years Ended March 31, 1978 and 1977

	1978	1977
INCOME		
Operations – Schedule 1	$ 2,262,543	$ 1,918,635
Miscellaneous	71	126
Total income	2,262,614	1,918,761
OPERATING EXPENSE		
Salaries and wages – Schedule 2	1,059,561	934,484
Managing Agent fees	20,355	13,562
Employee benefits – Schedule 3	525,114	499,748
Insurance	89,882	56,190
Protection service – A.D.T.	4,588	4,505
Licenses and bonds	475	475
Replacement reserve expense		
Building	80,000	80,000
Equipment	85,264	87,838
Terminal repairs, maintenance, supplies and expense – Schedule 4	201,679	111,067
Uncollectible accounts	2,500	75,166
Other expenses – Schedule 5	81,740	66,349
Total operating expense	2,151,158	1,929,384
Net Operating income (loss)	111,456	(10,623)
OTHER INCOME		
Recoveries of prior year bad debts	5,749	
Gain on sale of fixed assets		260
	5,749	260

OTHER EXPENSE		
Milk damage claim and cleanup expense		
Salaries and wages	36,075	
Fringe benefits	31,645	
Other	215	
Claims paid, net of $119,302 recovered through sale of salvage	151,773	
Total	219,708	
Net loss	$ (102,503)	$ (10,363)

Schedule 1

Seaway Port Authority of Duluth
Duluth, Minnesota

OPERATING INCOME - TERMINAL
Years Ended March 31, 1978 and 1977

	1978	1977
Stevedoring	$ 1,072,706	$ 835,489
Extra labor	129,127	157,795
Overtime	202,444	147,029
Detention	49,039	61,269
Total	1,453,316	1,201,582
Dockage	61,405	23,743
Electricity, water and telephone	15,236	4,988
Dunnage, blocking and paper	6,276	17,837
Equipment rental	9,450	5,706
Car loading and unloading	559,487	468,712
Storage	149,304	176,133
Cargo handling	2,279	8,897
Stenciling and labeling	40	338
Other	5,750	10,699
Total	$ 2,262,543	$ 1,918,635

Schedule 2

Seaway Port Authority of Duluth
Duluth, Minnesota

SALARIES, WAGES AND BENEFITS – TERMINAL
Years Ended March 31, 1978 and 1977

	1978	1977
SALARIES AND WAGES		
OPERATIONS		
Stevedoring	$ 544,418	$ 437,367
Checking	11,459	1,711
Crane operators	2,327	2,783
Car loading	283,488	336,862
Total	841,692	778,723
MAINTENANCE		
Fork lifts and tractors	35,661	22,298
Gantry crane	3,028	1,281
Equipment maintenance	5,214	2,690
General maintenance	3,230	2,085
Grounds and snow removal	48,331	17,816
Total	95,464	46,170
OTHER		
Superintendents	36,942	35,578
Terminal clerks	51,424	43,866
Accounting	13,030	11,992
Guards	21,009	18,155
Total	122,405	109,591
Total	1,059,561	934,484
Milk damage claim	36,075	
Total	$ 1,095,636	$ 934,484

Schedule 3

EMPLOYEE BENEFITS		
Social security tax	$ 60,531	$ 51,059
Health, welfare and pension	303,448	252,801
Life insurance	1,224	884
Workers compensation insurance	163,004	145,735
Unemployment compensation	28,552	49,269
Total	556,759	499,748
Less allocation to milk damage claim	(31,645)	
Total	$ 525,114	$ 499,748

Schedule 4

Seaway Port Authority of Duluth
Duluth, Minnesota

OTHER EXPENSE – TERMINAL
Years Ended March 31, 1978 and 1977

	1978	1977
REPAIRS, MAINTENANCE AND SUPPLIES		
Repairs and maintenance		
Buildings	$ 24,013	$ 11,575
Equipment	2,025	151
Fork lift trucks and tractors	7,359	6,957
Gantry cranes	89,384	2,155
Other	1,072	2,942
Supplies and expense		
Dunnage and kraft paper	3,395	9,752
Equipment certification	375	1,612
Equipment rent	2,330	3,856
Fork lift, gas, etc.	8,749	6,351
Small tools	1,282	1,326
Terminal supplies	10,546	15,585
Utilities		
Electricity	10,585	12,120
Fuel oil	12,671	15,882

Natural gas	4,958	3,403
Telephone	6,573	7,636
Water and sewage	9,517	4,739
Other expense	6,845	5,025
Total	$ 201,679	$ 111,067

Schedule 5

OTHER EXPENSE

Advertising	$ 85	$ 149
Audit fees	5,444	4,937
Claims	1,319	41,359
Container royalties		524
Copy machine supplies	1,682	808
Dues and subscriptions	1,147	153
Legal fees		90
Demurrage	38,275	699
Consulting fees	10,345	
Office supplies and expense	2,498	1,207
Payroll processing charges	3,541	3,635
Payroll excise tax	1,700	1,760
Postage	542	719
Printing, stationery and forms	1,688	2,262
Travel and entertainment	10,145	4,821
Union check issue charge	3,329	3,226
Total	$ 81,740	$ 66,349

APPENDIX I
Seaway Port Authority of Duluth
Duluth, Minnesota

STATEMENT OF INCOME AND EXPENSE
TERMINAL OPERATIONS

Years Ended March 31, 1982 and 1981

	1982	1981
INCOME		
Operations – Schedule 1	$ 1,992,040	$ 1,320,172
Total income	1,992,040	1,320,172
OPERATING EXPENSE		
Salaries and wages – Schedule 2	892,471	658,219
Employee benefits – Schedule 3	493,510	343,268
Insurance	78,159	65,066
Licenses and bonds	644	625
Managing Agent fees	24,414	21,225
Managing Agent fees – ship cleaning	1,168	147
Other expenses – Schedule 5	27,187	19,458
Protection service – A.D.T.	6,176	5,571
Replacement reserve expense		
Building	80,000	80,000
Equipment	73,175	79,832
Terminal repairs, maintenance, supplies and expense – Schedule 4	235,773	159,059
Uncollectible accounts		5,801
Total operating expense	1,912,677	1,438,271
Net operating income (loss)	79,363	(118,099)

OTHER INCOME -		
Adjustment to prior year demurrage liability		17,310
Bad debt recoveries	11,563	
Workers' compensation refund		34,790
Total other income	11,563	52,100
Net income (loss)	$ 90,926	$ (65,999)

Seaway Port Authority of Duluth
Duluth, Minnesota

OPERATING INCOME - TERMINAL
Years Ended March 31, 1982 and 1981

	1982	1981
Stevedoring	$ 897,375	$ 509,792
Detention	51,219	19,928
Extra labor	33,631	30,683
Overtime	70,393	75,709
Total salaries and wages	1,052,618	636,112
Cargo handling	1,447	1,661
Car loading and unloading	400,640	245,591
Dockage	88,929	70,878
Dunnage, blocking and paper	6,837	8,112
Electricity, water and telephone	129,340	37,365
Equipment rental	2,916	48,904
Other	3,337	5,174
Ship cleaning	10,001	1,140
Storage	283,569	258,235
Wharfage	12,406	7,000
Total operating income - terminal	$ 1,992,040	$ 1,320,172

Seaway Port Authority of Duluth
Duluth, Minnesota

SALARIES, WAGES AND BENEFITS - TERMINAL
Years Ended March 31, 1982 and 1981

	1982	1981
SALARIES AND WAGES		
OPERATIONS		
Stevedoring	$ 350,236	$ 232,836
Car loading	288,061	191,036
Checking	10,814	4,439
Crane operators	1,370	392
Total operations	650,481	428,703
MAINTENANCE		
Equipment maintenance	15,267	17,488
Fork lifts and tractors	34,545	21,473
Gantry cranes	1,992	1,813
General maintenance	8,053	16,752
Grounds and custodian	26,575	29,168
Total maintenance	86,432	86,694
OTHER		
Accounting	16,800	15,900
Guards	10,584	4,091
Superintendents	49,263	53,576
Terminal clerks	78,911	69,255
Total other	155,558	142,822
Total salaries and wages	$ 892,471	$ 658,219

Schedule 3

EMPLOYEE BENEFITS

Health, welfare and pension	$ 270,540	$ 186,990
Life insurance	1,937	2,083
Social security tax	58,267	39,857
Unemployment compensation	51,130	35,418
Workers' compensation insurance	111,636	78,920
Total employee benefits	$ 493,510	$ 343,268

Seaway Port Authority of Duluth
Duluth, Minnesota

OTHER EXPENSES - TERMINAL
Years Ended March 31, 1982 and 1981

	1982	1981
REPAIRS, MAINTENANCE AND SUPPLIES		
Repairs and maintenance		
Buildings	$ 11,681	$ 11,345
Equipment	468	2,205
Fork lift trucks and tractors	8,339	13,823
Gantry cranes	24,893	451
Lift station	970	1,025
Pallet repair	3,918	6,795
Supplies and expense		
Dunnage and kraft paper	3,472	5,417
Equipment certification	630	
Equipment rent	1,697	2,593
Fork lift, gas, etc.	10,062	7,235
Small tools	430	587
Terminal supplies	20,455	4,458
Utilities		
Electricity	81,015	46,091
Fuel oil	7,794	6,532
Natural gas	11,599	7,141
Telephone	9,306	8,895
Water and sewage	26,281	29,726
Other expense	12,763	4,740
Total repairs, maintenance and supplies	$ 235,773	$ 159,059

Schedule 5

OTHER EXPENSE

Audit fees	$ 6,290	$ 5,044
Claims	132	192
Copy machine supplies	310	122
Demurrage	1,140	160
Dues and subscriptions	506	893
Great Lakes excise tax	421	
Office supplies and expense	1,337	1,157
Payroll processing charges	3,240	2,745
Postage	879	673
Printing, stationery and forms	775	147
Travel and entertainment	8,554	6,117
Union check issue charge	3,603	2,208
Total other expense	$ 27,187	$ 19,458

Seaway Port Authority of Duluth
Duluth, Minnesota

STATEMENT OF INCOME AND EXPENSE
TANK FARM OPERATIONS
Years Ended March 31, 1982 and 1981

	1982	1981
INCOME		
Operations	$ 150	$ 2,170
OPERATING EXPENSE		
Salaries and wages	12,046	27,205
Employee benefits – Schedule 1	5,582	13,218
Audit	9	256
Check issue expense	69	111
Insurance	4,522	4,367
Repairs, maintenance and supplies – Schedule 2	8,629	12,021
Replacement reserve expense		
Equipment	784	1,018
Structures	20,000	20,000

Total operating expense	51,641	78,196
Net loss	$ (51,491)	$ (76,026)

Seaway Port Authority of Duluth
Duluth, Minnesota

OTHER EXPENSE - TANK FARM OPERATIONS
Years Ended March 31, 1982 and 1981

	1982	1981
EMPLOYEE BENEFITS		
Health and welfare expense	$ 4,011	$ 9,208
Social security tax	810	1,658
Unemployment compensation	374	1,388
Workers' compensation insurance	387	964
Total employee benefits	$ 5,582	$ 13,218

Schedule 2

REPAIRS, MAINTENANCE AND SUPPLIES		
Other expense	$ 8	$ 53
Structures and equipment - maintenance and repairs	57	2,125
Small tools		56
Tank farm supplies	300	790
Utilities		
Electricity	2,993	3,340
Natural gas	4,305	4,844
Telephone	376	333
Water and sewage	590	480
Total repairs, maintenance and supplies	$ 8,629	$ 12,021

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

No. 90-1636

In The

Supreme Court of the United States

October Term, 1990

DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN; AND THE BOARD OF TRUSTEES OF THE DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN,

Petitioners,

vs.

SEAWAY PORT AUTHORITY OF DULUTH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT

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The opinion of the District Court (Petitioner's Appendix C) is not officially reported. The opinion of the Court of Appeals for the Eighth Circuit (Petitioner's Appendix A) is reported at 920 F.2d 503 (8th Cir. 1990).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Respondent is an "employer" within the meaning of the MPPAA.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A, at A2-A4).

ARGUMENT

1. The Eighth Circuit's Decision Does Not Conflict With The Decisions Of This Court

Petitioner claims that the decision below is in conflict with the decisions of this Court, citing *Ingersoll-Rand Company v. Perry McClendon*, 498 U.S. ___, 111 S.Ct. 478,

482, 112 L.Ed.2d 474, 483 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 107 S.Ct. 2211, 2218, 96 L.Ed.2d 1 (1987). In particular, Petitioner contends that the Eighth Circuit's decision failed to follow this Court's lead in recognizing the pre-emption of state laws insofar as they relate to an employee benefit plan described in 29 U.S.C. Section 1003(b). *See* 29 U.S.C. Section 1144(a).

Contrary to Petitioner's argument, the Eighth Circuit's reasoning in its decision below is in complete harmony with the decisions of this Court. The Eighth Circuit was fully aware that ERISA pre-empts state law relating to an employee benefit plan. For example, in footnote 3 of the decision below, the Eighth Circuit explicitly recognized the dynamics of pre-emption, noting:

> "The circuits that have addressed the definition of employer under ERISA and MPPAA, however, have uniformly rejected the use of state common law."

Rather than resting its definitional analysis upon state law, the Eighth Circuit borrowed the well-recognized federal "contributing obligor" test first adopted by the Second Circuit in *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2nd Cir. 1989), wherein the Second Court stated:

> [T]he term employer in 29 U.S.C. Section 1381(a) means 'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.'

(See Petitioner's Appendix A at A10). Applying this test, without regard to state law of any kind, the Eighth Circuit concluded SPAD was not an employer under MPPAA:

> Our review of the record does not reveal any contracts SPAD signed explicitly obligating it to make pension contributions. (footnote omitted). Thus, applying the relevant case law, SPAD is not obligated to contribute and is not an employer under MPPAA.

(Petitioner's Appendix at A, A14-A15).

The Eighth Circuit's primary reference to state law is found in a lone short paragraph on page A15 of Petitioner's Appendix. In that paragraph, as further support for its conclusion that SPAD was not a contributing obligor, the court gave due recognition to the nature of SPAD. The court observed that SPAD, unlike any of the other employers in the case law, is a creature of state law. As a public body using public funds, SPAD operates only within a strict statutory framework. Under the Minnesota Statutes, SPAD was given the power to hire a managing agent, if it so chose, and to specify that "employees engaged by the agent are employers of the agent and not of the port authority" and that "the agent is responsible to pay the employees and to comply with * * * federal laws affecting employees."

Nowhere in the above-mentioned paragraph did the court imply that states have the power, by state legislation, to "isolate" themselves from federal laws such as ERISA and MPPAA. (See Petitioner's Brief at 9). Rather, the Eighth Circuit cited these Minnesota statutes merely to convey that although SPAD was unique compared to

the private-sector employers in case law, it had authority, like private sector employers, to hire an independent agent which, by state statute, was placed in a position free of political influence to hire, fire and make its own contracts regarding employment and benefits. Like private-sector employers, SPAD had the power to sign, or not sign, collective bargaining contracts and other documents evidencing an obligation to contribute to a plan. This power was expressly granted by state statute, which law Petitioner is presumed to know. *Albrecht v. Sell*, 260 Minn. 566, 110 N.W.2d 895, 897 (1961). By lawfully exercising its power to hire an independent agent that was free and unfettered in determining which employees to hire and which agreements to sign as a contributing obligor, SPAD is entitled to be free from any obligor liability arising out of the managing agent's contract with the ILA Plan. This is true not because the Minnesota Statutes superseded the MPPAA but because within the confines of the MPPAA, the state of Minnesota gave SPAD express legislative authority to hire independent agents who, as a result of agreements made solely by the agent, become contributing obligors, thereby protecting SPAD's limited public treasury.[1] (Without the existence of this state legislation, and the reference to it by the Eighth Circuit, Petitioner would argue that SPAD's contract with

---

[1] SPAD has no general taxing authority. *See* Minn. Stat. Section 469.053, subd. 1 (1990). Moreover, SPAD may not incur an obligation or expense unless existing appropriations together with reasonably expected SPAD revenue from other sources are sufficient to discharge the obligation or expense when due. Minn. Stat. Sec. 469.056, subd. 2 (1990).

North Central was outside its statutory authority, therefore ultra vires, with SPAD liability presumed on an ultra vires contract).

SPAD's unique status is also relevant in that, as a governmental non-profit body, SPAD had no incentive to hire a managing agent for an improper purpose. Petitioner's fears of a "sham" arrangement and "dummy" agents are simply unfounded in a public sector context such as this. (See Petitioner's Appendix A at A16). This is especially true under the particular facts of the instant case, where SPAD's sole concern was to find a private entity to manage and assume responsibility for the port terminal. SPAD's only "crime" was that it did not want to be in the day-to-day port management business. Petitioner does not and cannot point to any "hidden" or inappropriate motives behind the SPAD/North Central managing agent contract. That Petitioner's fears of impropriety and fraud with regard to SPAD's contractual arrangements are without foundation is only reaffirmed by a recognition of SPAD's government nature.[2]

---

[2] Government plans are exempt from the requirements of ERISA and the MPPAA. 29 U.S.C. 1103(b)(1). SPAD's *real* employees (office personnel, etc.) have always been participants in a government plan. Assuming, arguendo, that SPAD employed the longshoremen, SPAD could have avoided pension liability by obliging itself to make contributions to a government plan. Thus, although private sector employers might find a method to unfairly use intricate corporate structures to avoid withdrawal liability, public entities such as SPAD have no incentive to do so.

Thus, a closer examination of the Eighth Circuit's analysis reveals that the Eighth Circuit's opinion is completely consistent with the decisions of this Court. Petitioner is in error when it attempts to portray the Court of Appeal's relatively short references to state law as a separate, independent decisional basis for the court's opinion. To the contrary, the court rested its decision upon the contributing obligor test alone. Reference to the unique nature of SPAD bolstered the Eighth Circuit's conclusion that an extension of the contributing obligor test would be unwise in light of the absence of any evidence that SPAD either acted outside its authority or acted with improper motives.

Assuming, arguendo, that the court's state law analysis formed a separate and inaccurate basis for the court's decision, the court's ultimate conclusion of law (i.e. SPAD is not an employer within the meaning of MPPAA), is fully supported by the court's contributing obligor analysis, without regard to state law.

2. The Eighth Circuit's Decision Is Not Erroneous And Does Not Conflict With Other Appellate Decisions.

Petitioner acknowledges that in all of the appellate decisions where an entity has been held liable for "employer" withdrawal liability under MPPAA, the entity had a contractual obligation to make contributions to a multi-employer plan. (Petitioner's Brief at 11). *See Korea Shipping Corp.; Bowers v. Transportacion Martima Mexicana, S.A.*, 901 F.2d 258 (2nd Cir. 1990); *Philippines Micronesia & Orient Navigation Company v. NYSA – ILA*

Pension Trust Fund, 909 F.2d 39 (2nd Cir. 1990) (per curium), *Petition for cert. filed*, 59 U.S.L.2. 3295 (U.S. Oct. 3, 1990) (No. 90-576); *Carriers Container Council, Inc. v. Mobile S. & S. Ass'n, Inc – Int'l Longshoremen's Ass'n, AFL-CIO Pension Plan and Trust*, 896 F.2d 1330, 904 F.2d 28 (11th Cir. 1990) *petition for cert. denied*, 111 S.Ct. 308 (U.S. October 15th, 1990) (No. 90-323); *Laborers Local 938 v. B.R. Starnes Co.*, 827 F.2d 1454 (11th Cir. 1987) (per curium); *H.C. Elliot, Inc. v. Carpenters Pension Trust Fund*, 859 F.2d 808 (9th Cir. 1988). The Eight Circuit, after reviewing this case law, determined that since SPAD had no contractual obligation to contribute to the Plan, SPAD was not an employer within the meaning of MPPAA. This analysis by the Eighth Circuit is perfectly consonant with the decisions of the other circuits.

The so-called "contributing obligor" test adopted by the Eighth Circuit is premised upon the remedial and protective policies underlying the MPPAA. This test derives its authority from the congressional concern for the financial stability of multi-employer plans. *Korea Shipping Corp.*, 880 F.2d 1531, 1536-37. As noted by the Eleventh Circuit,

> The contributing obligor test drawn from Title I of ERISA furthers Congress' purposes in passing the MPPAA because it prevents a contributor to a plan from withdrawing its support without covering its share of unfunded liabilities.

Carriers Container Council, 896 F.2d 1330, 1343.

Rather than challenging the Eighth Circuit's adoption of the contributing obligor test, as developed by the Second, Ninth, and Eleventh Circuits, for determining

whether an entity is an employer within the meaning of MPPAA, Petitioner challenges the Eighth Circuit's *application* of the test. (Petitioner's Brief at 13.) Petitioner argues that the Appellate Court "simply erred when it concluded that there was no contractual obligation on the part of SPAD" to make contributions to a multi-employer plan. (Petitioner's Brief at 14.) Thus, Petitioner's disagreement with the Eighth Circuit is exceedingly narrow compared to the larger issue concerning the general meaning of the term "employer."

In contending that SPAD was contractually bound to make contributions to the ILA plan, Petitioner quotes Article III of the Managing Agent Agreements between SPAD and North Central, which provided as follows:

> FUNDS
>
> All funds which are required for or arise out of the operations conducted by the Agent shall be deposited in an account or accounts in depositories to be designated by SPAD. Such accounts shall be designated 'North Central Terminal Operators, Inc., Managing Agent, Public Marine Terminal Division, Seaway Port Authority of Duluth'. All such funds shall be considered the property of SPAD and not of the Agent. SPAD will provide Agent with sufficient funds in said accounts to carry on the operations.
>
> Agent will have a separate bank account to be called a payroll account into which deposits will be made from the operating account above described in order to enable Agent to meet its payroll expenses and related fringe benefits. ALL SUCH FUNDS SHALL CONTINUE TO BE THE PROPERTY OF SPAD UNTIL DISBURSED TO OR FOR THE ACCOUNT OF EMPLOYEES

FOR PAYROLL EXPENSES AND RELATED FRINGE BENEFITS.

(Emphasis added.)

Petitioner somehow interprets this language as a contractual obligation undertaken by SPAD to make contributions to a multi-employer plan. Such an interpretation is inaccurate for several reasons. First, the above-quoted language fails to even *mention* a multi-employer plan. In fact, unlike the contractual documents relied upon in the cases cited by Petitioner, nowhere in the *entire* managing agent agreement is there any reference to a multi-employer plan. *Compare Korea Shipping Corp.* (document provided that "assessment shall be collected by the direct employer from each of the carriers and shall be paid to the NYSA for immediate transmittal to the NYSA-ILA Fringe Benefits Escrow Fund . . . Pension payment shall be made by the NYSA directly to the NYSA-ILA Pension Trust Fund"); *Carriers Container Council*, 896 F.2d at 1344 (document provided that "assessment amounts shall be collected as necessary from the carriers by . . . [CCC] which shall pay out the [multi-employer pension plan] shortfall payments. . . .) With respect to the managing agent agreements, neither North Central nor SPAD made promises regarding the maintenance of a multi-employer plan. Although it is true that SPAD agreed to advance operating capital to North Central for North Central's payment of "fringe benefits" to the employees, such an agreement is in no way comparable to the pension fund obligations undertaken by the contributing obligors of previous case law, as the agreement established no duty running from SPAD to the ILA Plan that SPAD would make contributions to the Plan. Accordingly, SPAD could

not possibly incur withdrawal liability for failing to make contributions which were never promised the Plan in the first place.

Second, Petitioner misunderstands the purpose of the above-quoted language in the managing agent agreements. The monies that were deposited into the payroll account were public monies. As such, under the Minnesota Constitution, the monies had to be used for public purposes only, and not in the furtherance of any private purpose or in the aid of any private individual or entity. *See Port Authority of City of Saint Paul v. Fisher*, 132 N.W.2d 183, 192, 196 (Minn. 1964). Respondent, recognizing this constitutional limitation, reserved limited control of the funds until final disbursement to ensure that the funds would not be co-mingled with private funds but instead used by North Central for a public purpose. To suggest that this sound fiscal management somehow evidenced a contractual commitment on the part of SPAD obligating it to make contributions to the ILA plan is a distortion of the facts. SPAD never contractually obliged itself to the ILA plan.

Third, Petitioner's ill-conceived expansion of the contributing obligor contractual test leaves SPAD and similarly situated public bodies at the mercy of their private managing agents. Carrying Petitioner's position to a logical conclusion, a managing agent's *unilateral* decision to join and then withdraw from a multi-employer plan would expose the public body to unexpected and uninitiated pension liability. The public body would bear the full financial consequences of a decision in which it had no participation. This is not the result intended by the

MPPAA nor was this result contemplated by the originators of the contributing obligor test. Under the contributing obligor test adopted by the Second, Eighth, Ninth and Eleventh Circuits, the public body is not held liable for an unfunded multi-employer plan unless it expressly enters into a bargaining agreement or similar contract whereby it agrees to fund that particular plan. By contrast, in the instant case, SPAD never asked North Central to join the ILA plan or, for that matter, any plan whatsoever. North Central never sought SPAD's approval for North Central's acts relating to the Plan or the employees. SPAD had no opportunity to stop North Central from withdrawing from the ILA plan. To impose unfunded pension liability upon SPAD under these circumstances is unreasonable and unfair. Protecting the financial viability of multi-employer plans should not come at the expense of the victimization of public bodies who hire independent managing agents. This is particularly true in the instant case, where Petitioner has made no attempt to recover its loss from North Central, the only entity which had a choice as to whether or not withdrawal liability was to be incurred.

Fourth, it is important to note that before the MPPAA was enacted, SPAD at one time had contractually obligated itself to contribute to the ILA multi-employer plan. (See Respondent's Appendix A at A1). In 1979, SPAD was removed as a signatory to the Restated Trust Agreement. (See Petitioner's Appendix A at A33-A35).[3] The 1979 Restated Trust Agreement also provided that,

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[3] In Section 1.5(d) of the Restated Trust Agreement, the agreement provided that SPAD and certain other original

(Continued on following page)

> Employers, who are not signatory to this Agreement but who have persons in their employ coming within the classifications represented by the Unions signators hereto and who have collective bargaining agreements with such Unions, may become a participating employer under the terms of this Agreement and make contributions to the Trust, with the consent of the Trustees, on the signing of a Participation Agreement and/or a labor agreement, where applicable, providing for participation in the Trust containing such terms as required by the Trustees and on such basis as agreed upon by such new contributing Employers and the Trustees respecting the contributions to be made and the coverages to be afforded to the employees.

(Respondent's Appendix A at A6, Section 2.2.) It is undisputed that SPAD never signed a Participation Agreement or labor agreement providing for participation in the Trust. Thus, by its own terms, the Restated Trust Agreement disavows any SPAD responsibility for plan contributions. Had Petitioner intended to hold SPAD contractually liable for plan contributions, it never would have expressly excluded SPAD by the very language of the Restated Trust Agreement.

Finally, it is important to note that Petitioner has not cited a single appellate case which is in conflict with the Eighth Circuit's decision. Petitioner cannot dispute the fact that not a single appellate decision has imposed withdrawal liability upon an entity that has such a tenuous, if any, connection to a plan. Nor has any appellate

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(Continued from previous page)

signatories "are no longer parties to this restated Agreement and Declaration of Trust" (Respondent's Appendix A at A4).

decision imposed withdrawal liability upon a public entity. In every case cited by Petitioner, the "contributing obligor" was a private sector entity which signed a contract expressly requiring it to contribute to a particular multi-employer plan.

3. National Importance Of The Case.

Petitioner argues that the Court of Appeals's decision below unwisely permits an "employer" to "contract away" its withdrawal liability by entering into an agreement with a third party for that purpose. (See Petitioner's Brief at 15). To begin with, this argument begs the question with respect to who is an "employer." The Second, Eighth, Ninth and Eleventh Circuits have defined "employer" as an entity that obligates itself to make contributions to a multi-employer plan. Under such a definition, an employer who withdraws from a plan will be liable for such withdrawal regardless of any contracts to the contrary. In other words, it is impossible to be an "employer" and at the same time be absolved of withdrawal liability.

Second, Petitioner's use of the term "contract away" is misleading. SPAD cannot "contract away" something it never had to begin with.

Boiled to its essence, Petitioner's position is that principals should not be able to hire managing agents to serve as both common law employer and sole "contributing" employer. But as the Eighth Circuit stated succinctly,

> "There is nothing inherently improper in this, however, because parties may contract as they see fit, within certain limitations. A pension

> plan's proper recourse is to assess withdrawal liability against the managing agent."

(See Petitioner's Appendix A at A16). Petitioner has made no attempt to hold North Central liable for its withdrawal from the Plan. Instead, it leapfrogged the managing agent and sought recourse directly from SPAD, a public body with limited funds. Now Petitioner asks this Court to extend the contributing obligor test when it has not even exhausted the remedies it already has.

Petitioner seeks to distract the Court from Petitioner's ability to redress its own withdrawal liability situation by conjuring up scenarios where entities attempt to circumvent the MPPAA by the use of "intricate corporate structures." (Petitioner's Brief at 16-17). This circumvention argument is unpersuasive. For one thing, Petitioner's fears of sham, insolvent entities circumventing the MPPAA are entirely hypothetical and conjectural. Petitioner does not assert that North Central was an insolvent or undercapitalized entity, nor is there an allegation that SPAD encouraged North Central to join a multi-employer plan.[4] Petitioner merely asserts that some entity under some circumstance might employ an insolvent agent to assume pension liability, thereby undermining the financial stability of a plan. The Court is well aware that rules of law are best decided upon specific concrete facts, not abstract, hypothetical scenarios. *See Abbott Labs v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 72, 81 S.Ct. 1357, 1397, 6

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[4] As observed in footnote 2 of this brief, SPAD had no incentive to circumvent ERISA or MPPAA.

L.Ed.2d 625 (1961). The Eighth Circuit, recognizing this principle, refused to be drawn into an abstract analysis. Instead, it correctly concluded that if and when there is evidence of a particular "sham" or insolvent entity assuming pension fund liability, the judicial response can be decided at that time, under the clear light on concrete, specific facts.

Also, Petitioner's fears of a sham entity circumventing the MPPAA are totally unfounded. The trustees of multi-employer pension plans are perfectly capable of protecting their plans from "sham" contributors. If the plan trustees are uncertain as to the financial viability of a potential contributor, the trustees can require financial assurances and/or refuse the entity admission to the plan. Labor organizations are also capable of monitoring the financial health of bargaining agreement signatories. This self-help is far more likely to protect the financial stability of multi-employer plans than Petitioner's scheme in which entities associated with contributing obligors are unsure whether or not they may be held liable for millions of dollars in unfunded pension obligations.

Finally, the MPPAA already has a special provision by which corporations are prohibited from utilizing intricate corporate structures in order to avoid withdrawal liability. Section 1301(b) provides that:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

Treasury Regulation 11.-414(c)-1(a) provides in pertinent part:

> [T]he term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" . . . , a "brother sister group of trades or businesses under common control" . . . , or a "combined group of trades or businesses under common control". . . .

Under the "controlled group" concept, a business may not "limit its responsibilities under [the MPPAA] by fractionalization of its business operations. *Pension Benefit Guaranty Corp. v. Center City Motors, Inc.*, 609 F.Supp. 409, 412 (S.D. Cal. 1984); *see also Pension Benefit Guaranty Corp. v. Ouimet*, 470 F.Supp. 945 (D. Mass 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914, 101 S.Ct. 1356, 67 L.Ed.2d 339 (1981). Thus, congress foresaw the problem of business fractionalization and devised a limited special remedy to prevent its occurrence. Interestingly, by contrast, congress made no attempt to forbid principals from hiring managing agents to serve as common law employer and sole "contributing" employer. One can only conclude that had congress intended to hold *all* principals, even those who have signed nothing obligating them to contribute to a multi-employer plan, responsible for the withdrawal liability of independent managing agents, congress would have adopted a framework more expansive than the "controlled group" concept.

CONCLUSION

As discussed at length above, it is both premature and unnecessary to grant the petition for certiorari with respect to the legal issues now before the Court. It is premature for three reasons. First, as noted by the Eighth Circuit, there is a paucity of case law from which the Court can gather insight with regard to the definition of "employer" as used by the MPPAA. (Petitioner's Appendix A at A10). In fact, only the Eighth Circuit has addressed the question of whether withdrawal liability may be imposed upon a public body like SPAD which had such a tenuous connection with a multi-employer plan. Second, as noted by the Eighth Circuit, the Court is not faced with a sham insolvent agent in the instant case; accordingly that issue should be left for another day. (Petitioner's Appendix A at A16). Finally, Petitioner has not cited a single appellate case which conflicts with the Eighth Circuit's decision. Prudence dictates that other circuits should be given the first opportunity to determine whether the Eighth Circuit's analysis is correct.

It is unnecessary for this Court to grant the petition for certiorari because the Eighth Circuit properly adjudicated the issues before it. The Eighth Circuit correctly recognized that SPAD never obligated itself to make contributions to a multi-employer plan. (Petitioner's Appendix A at A14). SPAD did not sign any collective bargaining agreements, shipping association agreements, or pension plan trust agreements obligating itself to contribute to the Plan. The Plan was well aware both practically and legally that by the terms of its Restated Trust Agreement and the Minnesota Statutes governing the managing agent arrangement, it could not look to SPAD

for financial support. To impose withdrawal liability on a public body such as SPAD (which made no decision, evidenced by the execution of any documents, to join the Plan, nor did it engage in contractual avoidance by encouraging its managing agent to join the Plan) is completely contrary to the spirit behind the MPPAA and the well-reasoned law of the circuit courts.

For the reasons set forth above, the petition for certiorari should be denied.

Dated: April 24, 1991

Respectfully submitted,

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APPENDIX A

RESTATED AGREEMENT AND DECLARATION OF TRUST UNDER DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN

THIS RESTATED TRUST AGREEMENT, made and entered into as of the 13th day of December 1979, by and between the undersigned Union Trustees and Employer Trustees, who, together with their successor Trustees designated in the manner hereafter provided, are hereinafter collectively referred to as "Trustees".

WHEREAS, an Agreement and Declaration of Trust for the purpose of providing and maintaining insured pensions for participating employees was made and entered into effective the 10th day of December 1964, between General Cargo Workers, Local No. 1366, Duluth, Minnesota, an affiliate of the International Longshoremen's Association, AFL-CIO, and General Cargo Workers, Local No. 1037, Superior, Wisconsin, an affiliate of the International Longshoremen's Association, AFL-CIO, and the International Longshoremen's Association, AFL-CIO, hereinafter called the Union, and Duluth-Superior Marine Association, American Grain Trimmers, Inc., Atlantic & Gulf Grain Stevedoring Associates, Boland & Cornelius, Cullen Stevedoring Company, Ltd., Duluth Seaway Agency, Inc., Ceres Stevedoring, Inc., Alastair Guthrie, Incorporated, The M. A. Hanna Company, S.A. McLennan, J. F. McNamara Corp., Nicholson Transit Co., Pearson Stevedoring Co., Rogers Terminal and Shipping Corporation, Sauter Stevedoring Corp., Sealanes International, Inc., Seaway Port Authority of Duluth, Svensson & Baker, Inc., and Twin Ports Ship Cleaners, Incorporated, hereinafter called the Employers, and the individual

employers who employ members of "the Unions" and who have individually entered into a collective bargaining agreement with "the Unions", hereinafter referred to collectively as "the Employer", which agreement has heretofore been amended; and

WHEREAS, said Agreement and Declaration of Trust provides that it is subject to amendment from time to time by an agreement in writing signed by the Board of Trustees; and

WHEREAS, the Trustees desire to amend, continue and restate this Trust Agreement and maintain the Duluth-Superior, ILA Marine Association Pension Trust to conform with the requirements of the Employee Retirement Income Security Act of 1974 and any subsequent amendments thereto and regulations promulgated pursuant to and any other federal or state law as may or become applicable.

NOW, THEREFORE, in consideration of the promises and in order to continue and provide for the maintenance of the Duluth-Superior, ILA Marine Association Pension Trust, hereinafter referred to as the "Trust", the undersigned Union Trustees and Employer Trustees declare that they will receive and hold such contributions and other money or property which may come into the Trust pursuant to the following powers and duties and for the following uses, and none other, to-wit:

ARTICLE I.

DEFINITIONS

1.1 *Act*. The term "Act" as used herein shall mean the Employee Retirement Income Security Act of 1974, any

amendments as may from time to time be made and any regulations promulgated pursuant to the provisions of the said Act.

1.2 *Administrator.* "Administrator" means the Trustees, collectively, of this Trust.

1.3 *Collective Bargaining Agreement.* Any collective bargaining agreement now or hereafter in effect, including any extensions, amendments and renewals that, pursuant to which payments are made by the Employer into the Trust.

1.4 *Employee.* Any employee with respect to whose employment payments are required to be made to the Trust by an Employer pursuant to a Collective Bargaining Agreement or pursuant to any written agreement hereinafter described. The term "Employee" also includes employees of "the Unions", and employees of the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund.

1.5 *Employer.*

a. The term "Employer" as used herein shall mean any employer (1) who has a Collective Bargaining Agreement with the Unions requiring periodic contributions to be made to the Trust and who are or become parties to this Agreement or (2) who are not parties to this Agreement but who have persons in their employ coming within the classifications represented by the Unions and have collective bargaining agreements with the Unions and who consent to be bound by the terms of this Trust

Agreement and are bound in writing to make contributions to the Trust with respect to Employees, or (3) Employers who are not parties to this Agreement and do not have a collective bargaining agreement in the Unions but who on occasion use members of the Union and who have agreed in writing to make contributions to the Trust with respect to those employees.

b. The term "Employer" also includes a Union affiliated with "the Unions", and the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund, providing any such organization shall first become contractually obligated to make similar contributions on behalf of its employees in accordance with the Trust, signs a Participation Agreement, is accepted for participation by the Trustees in accordance with the provisions of the Plan and makes contributions to the Trust as required by the Plan. Neither a Union affiliated with "the Unions", nor the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund becoming an Employer pursuant to this paragraph shall become entitled to participate in the selection or replacement of Union or Employer Trustees by virtue of being an Employer hereunder.

c. If an Employer has more than one place of business, the term "Employer" shall only apply to the place or places of business covered by the Collective Bargaining Agreement requiring contributions to the Health and Welfare Fund.

d. The term "Employer" includes the following Employers and all other subsequent employers who fall within the definition of an "Employer" as contained in this Article I., Section 1.5: Ceres Stevedoring, Inc.; American Grain Trimmers, Inc.; Guthrie Hubner, Inc.; Hanna Mining Company, Agent; S.A. McLennan; Rogers Terminal and Shipping Corporation; the Svensson Shipping Agency, Inc.; Empire Stevedoring Company, Inc.; Federal Marine Terminal, Inc.; Great Lakes Storage and Contracting Company, Inc.; and North Central Terminal Operators, Inc.; and the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund. Those other employers who signed the original Agreement and Declaration of Trust who are not described immediately above are no longer parties to this restated Agreement and Declaration of Trust.

1.6 *Union*. The term Union shall mean the General Cargo Workers, Local No. 1366, Duluth, Minnesota and affiliate of the International Longshoremen's Association, AFL-CIO, and General Cargo Workers, Local No. 1037, Superior Wisconsin, an affiliate of the International Longshoremen's Association, AFL-CIO.

1.7 *Trust Agreement*. The terms "Trust Agreement", "Trust" or "Restated Agreement and Declaration of Trust" as used herein shall mean this instrument, including any amendments or modifications which may from time to time be made.

1.8 *Pension Plan or Plan*. "Pension Plan or Plan" shall mean the Duluth-Superior, ILA Marine Association Restated Pension Plan, as amended.

1.9 *Administrative Manager.* The individual, firm or corporation employed by the Trustees to administer the office or offices of the Trust Fund as set forth in Article 7.6 of this Trust Agreement.

1.10 *Trustees.* Trustees are those persons selected from time to time by both the Employer and Union pursuant to section 3.2 of Article III of this Agreement to administer the Trust.

1.11 *Contract or Group Insurance Contract.* The term "Contract" or "Group Insurance Contract" as used herein means a group annuity policy issued by an insurance company which provides for the accumulation of funds and the purchase of annuities at a participant's retirement date.

ARTICLE II.
CONTRIBUTIONS

2.1 *Contributions.* Each participating Employer shall pay to the Trustees, on or before the 15th day of each month the contribution required to be made by the Employer, such contributions to be in such amount as the parties may by their collective bargaining agreement determine from time to time between them. Such date or payments may be adjusted by the Trustees as they may determine pursuant to their rules of procedure.

2.2 *New Employers.* Employers, who are not signatory to this Agreement but who have persons in their employ coming within the classifications represented by the

Unions signators hereto and who have collective bargaining agreements with such Unions, may become a participating employer under the terms of this Agreement, and make contributions to the Trust, with the consent of the Trustees, on the signing of a Participation Agreement and/or a labor agreement, where applicable, providing for participation in the Trust containing such terms as required by the Trustees and on such basis as agreed upon by such new contributing Employers and the Trustees respecting the contributions to be made and the coverages to be afforded to the employees covered.

ARTICLE III.
DESIGNATION OF TRUSTEES

3.1. *Number of Trustees.* The Trust shall be administered by a Board of Trustees, two of whom shall be chosen by the Employers and two of whom shall be chosen by the Union.

3.2 *Selection of Trustees.* The two Employer Trustees shall be selected by the Employers, and two Union Trustees shall be selected by the Unions. Both the Employers and the Unions may also select up to two (2) alternate Trustees for each group.

The term "Trustees" as used herein shall include an Alternate Trustee when he is acting in the place of a Trustee.

The Trustees shall consent to their appointment as Trustees and accept such appointment in writing.

3.3 *Identity of Trustees.* As of the effective date of this Restated Trust Agreement, the Trustees are as follows:

Employer Trustees	Union Trustees
1.	1.
2.	2.

3.4 *Tenure.* Each Trustee shall continue to serve during the existence of the Trust until his death, incapacity, resignation or removal.

3.5 *Resignation or Removal of Trustees.* A Trustee may resign at any time by giving a ten (10) day notice in writing to the remaining Trustees, which notice shall state the effective date of the resignation, when it shall take effect. In the event of the death, incapacity, removal or resignation of a Trustee, a successor Trustee shall be appointed within thirty (30) days of the effective date of the vacancy as follows: At any time for good cause, after notice and hearing with the Trustee present, a Union Trustee may be removed or appointed by a written instrument signed by the Union. Similarly, any Employer Trustee may be removed or appointed at any time by a written instrument signed by not less than three of those Employers employing a majority of the Employees covered by this Trust Agreement. In such event of party removing a Trustee shall give the other Trustees five (5) days written notice prior to the effective date of such removal of such action and shall designate in such notice the successor Trustee. The Trustees may require a special accounting before a deceased, retired, or removed Trustee is relieved of his responsibility as a Trustee.

In no event shall this Trust or the operation of the Board of Trustees be impaired by the death, incapacity, resignation or removal of a Trustee, and in the event of a vacancy on the Board of Trustees, the remaining Trustees

shall have full power to act until the designation of a successor Trustee.

As long as a vacancy exists on the Board of Trustees, or in the temporary absence of a Trustee, any alternate Trustee designated by the Employer may act in the place and stead of an absent or deceased Trustee designated by the Employer, and any alternate Trustee designated by the Union may act in the place and stead of an absent or deceased Trustee designated by the Union, and any alternate Trustee shall be vested with all the property, rights, power and duties of a Trustee.

3.6 *Successor Trustee.* In the event of the death, incapacity, removal or resignation of a Trustee, a Successor Trustee shall be appointed within thirty (30) days of the effective date of the vacancy by a written instrument signed by the chief executive officer of the Union, if a Successor Union Trustee, and by a written instrument signed by a majority of the Employers party to this Agreement or by Employers employing a majority of employees covered by this Agreement. In the event of conflicting action, action by Employers employing a majority of the covered employees shall control. Written notice of the appointment shall be served upon the other Trustees with said time.

Any Successor Trustee shall immediately upon his designation as a Successor Trustee and his acceptance thereof in writing, as provided in Section 3.7, become vested with all the property, rights, power and duties of a Trustee hereunder with like effect as if originally named a Trustee without necessity of any formal conveyance of other instrument of title. No Successor Trustee shall in

any way be liable or responsible for any act or omission in the administration of the Trust prior to the date any such Trustee becomes a Trustee.

3.7 *Acceptance of the Trust by Trustees.* A Trustee shall execute a written acceptance in a form satisfactory to the Trustees and consistent with the Act and thereby shall be deemed to have accepted the Trust created and established by this Trust Agreement and to have consented to act as Trustee and to have agreed to administer the Trust Fund as provided herein. Such written acceptance shall be filed with the Trust's Administrative Manager, who shall notify the remaining Trustees of the Receipt of such acceptance.

3.8 *Limitation of Liability of Trustees.* No Trustee shall be liable or responsible for his own acts or for any acts or defaults of any other fiduciary or party in interest or any other person except in accordance with applicable federal law. The Trustee shall not be liable for the acts or omissions of any investment manager, attorney, agent or assistant employed by them in pursuance of this Agreement, provided such investment manager, attorney, agent or assistant was selected pursuant to this Trust Agreement.

ARTICLE IV.
NAME AND PRINCIPAL OFFICE OF TRUST

4.1 The Trustees shall be known in their joint capacity as the "Trustees of the Duluth-Superior, ILA Marine Association Pension Trust.

4.2 The principal office of said Trust shall be located at 2904 West Third Street, in the City of Duluth, St. Louis

County, Minnesota 55806, unless otherwise designated by the Trustees.

ARTICLE V.
ADMINISTRATION OF TRUST FUND

5.1 *Meetings*. The Trustees shall meet at least once each fiscal year at the principal office of the Trust and at such other times at the Trustees shall deem necessary. The Chairman shall set the date, time and call the annual meeting, and, if he fails within the year to do so, the Secretary shall do so. The Chairman or Secretary or any two or more Trustees may call a special meeting of the Board of Trustees. Any annual or special meeting shall be called by giving the Trustees twenty (20) days' notice if an annual meeting or two (2) days' notice in writing if a special meeting, stating the time and place of such meeting. The attendance of a Trustee at a meeting shall constitute a waiver of notice of such meeting, except where a Trustee attends a meeting, and objects thereat to the transaction of any business because the meeting is not lawfully called or convened. Notice of substance of all matters to be acted upon at any meeting shall be contained in the notice of the meeting unless all the Trustees shall be present at the meeting. A quorum of the Trustees for the transaction of business except as otherwise provided herein shall consist of one Trustee appointed by the Union and one Trustee appointed by the Employers. It is the intention of the parties that at any time any vote or other action is taken by the Board of Trustees the number of Union Trustees and Employers Trustees qualified to act, vote and constitute a quorum shall always be equal.

5.2 *Voting*. All actions by and decisions of the Board of Trustees at a meeting at which a quorum is present shall be by the affirmative vote of a majority of the total number of the Trustees authorized. Each Trustee shall have one (1) vote. An alternate Trustee cannot vote except if acting in behalf of an absent Trustee.

5.3 *Organization and Operation of Trustees*. At the commencement of each fiscal year of the Trust, the Trustees shall select from among them a Chairman and a Secretary who shall each serve for a period of one (1) year. One officer shall be a Union Trustee and one officer shall be an Employer Trustee. The Secretary shall cause to have kept an accurate record of the proceedings at all meetings of the Trustees and of any action taken. The minutes of all meetings and a record of action take shall be transcribed and a copy retained by the Secretary as a trust record and a copy distributed to each Trustee at the cost of the Trust.

5.4 *Procedure in Event of Deadlock of Trustees*. In the event that a majority of Trustees are unable to agree upon any matter in connection with the administration of this Trust, then the Trustees shall select a neutral person as an impartial arbitrator who is willing to act in the determination of such dispute. In the event a majority of the Trustees fail to agree upon the selection of an impartial arbitrator, then any one or more of said Trustees may petition the U.S. District Court, District of Minnesota, to make the appointment of an impartial umpire to decide such dispute. The reasonable compensation of such umpire and the costs and expenses (including, without limitation, attorneys' and reporter fees) incidental to any proceedings instituted to break a deadlock shall be paid by the Trust. Proceedings hereunder shall be conducted

pursuant to Minnesota Statutes, Chapter 572. The impartial arbitrator shall have no power to alter, delete, amend, add to, take away from or disregard any of the provisions of this Agreement and Declaration of Trust. The decision of the impartial arbitrator shall be final and binding upon the Trustees, all parties hereto, the employees and their beneficiaries, and upon all persons involved in any way with the Trust or claiming any benefit thereunder.

Differences arising as to the interpretation or application of the provisions of this Trust Agreement or relating to Employee benefits provided for hereunder shall not be subject to the grievance or arbitration procedure established in any collective bargaining agreement.

5.5 *Office of the Trust.* The Trustees shall establish an office in Duluth, Minnesota, the address being 2902 West Third Street, Duluth, Minnesota 55806 for the transaction of the business of the Trust. At such office and at such other places as may be required by law there shall be maintained the books and records pertaining to the Trust and its administration.

5.6 *Removal of Trustee (Violation of Act).* The Board of Trustees shall initiate action to cause the removal of any fellow member Trustee who may be serving as a Trustee in violation of the Act. The vacancy or vacancies caused by such a removal shall be filled in accordance with Section 3.5 of this Agreement.

ARTICLE VI
POWERS AND DUTIES OF TRUSTEES

6.1 *Conduct of Trust Business.* The Trustees shall have general supervision of the operation of this Trust and

shall conduct the business and activities of the Trust in accordance with this Trust Agreement and applicable law. The Trustees shall hold, manage and protect the Trust and collect the income therefrom and contributions thereto. The Trustees may, in the course of conducting the business of the Trust, execute all instruments in the name of the Duluth-Superior, ILA Marine Association Pension Trust, which instruments shall be signed by at least one Employer and one Union Trustee; provided, however, any one Trustee may execute legal documents to commence and process lawsuits to enforce trust collections on behalf of the Trustees.

6.2 *Employers, Expert Assistance and Delegation*. The Trustees shall have the power and authority to use and apply the Trust for the following purposes:

a. To pay or provide for the payment of all reasonable and necessary expenses of collecting Employer contributions and administering the affairs of this Trust, including but not limited to, the employment of such administrative, legal, expert, investment, advisory, clerical or other assistance, the purchase or lease of such premises, materials, supplies and equipment and the performance of such other acts as the Trustees, in their sole discretion, find necessary or appropriate in the performance of their duties.

6.3 *Investments*.

a. The Trustees shall have the power and authority, in their sole discretion, to invest and reinvest such funds as are not necessary for current expenditures or liquid reserves, as they may from time to time determine, in

such investments as are legal investments under applicable state and federal law relating to the investment of the employee Trust, not limited, however, by any limitation restricting investments in common stocks to a percentage of the Trust or to a percentage of the total market value of the Trust. The Trustees may sell, exchange or otherwise dispose of such investments at any time and from time to time. The Trustees shall also have power and authority (in addition to, and not in limitation of, common law and statutory authority) to invest in any stocks, bonds or other property, real or personal, including improved or unimproved real estate and equity interests in real estate, where such an investment appears to the Trustees, in their discretion and consistent with their fiduciary obligations, to be in the best interest of the Trust and its Participants and Beneficiaries, judged by then prevailing business conditions and standards. The Trustees shall have the authority, in respect to any stocks, bonds or other property, real or personal, held by them as Trustees, to exercise all such rights, power and privileges as might be lawfully exercised by any person owning similar stocks, bonds or other property in his own right.

b. *Delegation and Allocation of Investment Functions.*

(1) The Trustees are authorized, in their discretion, by resolution, to allocate to a committee of Trustees such duties and responsibilities to invest and reinvest such Trust assets as they shall specify in such allocation.

(2) The Trustees shall have the power and authority to appoint one or more investment managers (as defined in Section 3(38) of the Act) who shall be responsible for the management, acquisition, disposition,

investing and reinvesting of such of the assets of the Trust as the Trustees shall specify. Any such appointment may be terminated by the Trustees upon thirty (30) days' written notice. The fees of such investment manager, and its expenses to the extent permitted by law, shall be paid out of the Trust.

(3) In connection with any allocation or delegation of investment functions under paragraphs (1) and (2) of this Subsection b, the Trustees shall, from time to time, adopt appropriate investment policies or guidelines.

6.4 *Deposits and Disbursements.* All Trust funds not invested shall be deposited by the Trustees in such depository or depositories as the Trustees shall from time to time select, and any such deposit or deposits, or disbursements therefrom, shall be made in the name of the Trust in the manner designated by the Trustees and upon the signature(s) of the persons designated and authorized by the Trustees or by the Investment Manager appointed in accordance with Section 3b(2) of this Article.

6.5 *Allocation and Delegation of Fiduciary Responsibilities.* The Trustees may, by resolution or bylaw or by provisions of this Trust Agreement, allocate fiduciary responsibilities and various administrative duties to committees or subcommittees of the Board of Trustees, and they may delegate such responsibilities and duties to other individuals, as they may deem appropriate or necessary in their sole discretion and consistent with the Act. The Trustees shall not be deemed responsible for any errors or omissions of persons to whom such responsibilities or duties have been properly allocated or delegated.

6.6 *Administrative Manager.* The Trustees may employ or contract for the services of an individual, firm or corporation, to be known as "Administrative Manager", who shall, under the direction of the Trustees or under the direction of any appropriate committee of the Trustees, administer the office or offices of the Trust and of the Trustees, coordinate and administer the accounting, bookkeeping, and clerical services, provide for the coordination of actuarial services furnished by the consulting actuary, prepare (in cooperation where appropriate with the consulting actuary, and independent auditor) all reports and other documents to be prepared, filed or disseminated by or on behalf of the Trust in accordance with law, assist in the collection of contributions required to be paid to the Trust by Employers and perform such other duties and furnish such other services as may be assigned, delegated or directed or as may be contracted by or on behalf of the Trustees. The Administrative Manager shall be the custodian on behalf of the Trustees of all documents and other records of the Trustees and of the Trust.

6.7 *Bylaws, Rules and Regulations.*

a. The Trustees are hereby empowered and authorized to adopt bylaws and to promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of this Trust Agreements. All bylaws, rules and regulations adopted by action of the Trustees shall be binding upon all parties hereto, all parties dealing with the Trust and all persons claiming and benefits hereunder.

b. The Trustees shall, by the affirmative vote of at least two (2) Employer Trustee votes and two (2) Union Trustee votes, adopt the Plan and bylaws, rules or regulations in respect to the Plan or eligibility of Participants and Beneficiaries for the benefits herein provided, which Plan, bylaws, rules or regulations may, by the above-specified vote, be changed and modified from time to time in such manner and to such extent as the Trustees may deem expedient and necessary in the proper administration of the Trust.

c. No bylaw, regulation, rule, action or determination made or adopted by the Trustees, nor any decision or determination made by any impartial umpire appointed pursuant to Section 6.4 of this Agreement, shall in any manner conflict or be inconsistent (1) with any provision of the applicable current collective bargaining agreement in effect or, which may be made, between the Employers and the Union, (2) with this Trust Agreement, and (3) with any applicable federal, state or local law.

6.8 *Additional Authority*. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

a. To enter into any and all contracts and agreements for carrying out the terms of this Trust Agreement and for the administration of the Trust and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be binding and conclusive on the parties hereto and on the Participants involved, except as may be limited by law;

b. To keep property and securities registered in the names of the Trustees or of the Trust or in the name of

any other individual or entity nominee or nominees duly designated by the Trustees with disclosure of any fiduciary relationship;

c. To establish and accumulate as part of the Trust such reasonable reserve funds as the Trustees, in their sole discretion, deem necessary or desirable to carry out the purposes of such Trust;

d. To pay out of the Trust all real and personal property taxes, income taxes and other taxes of any and all kinds levied or assessed under existing, or future laws or upon or in respect to the Trust or any money, property or securities forming a part thereof;

e. To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder;

f. To sell, exchange, lease, convey, mortgage or dispose of any property, whether real or personal, at any time forming a part of the Trust upon such terms as they may deem proper and to execute and deliver any and all instruments of conveyance, lease, mortgage and transfer in connection therewith; and

g. To establish and carry out a funding policy and method consistent with the objectives of this Trust Agreement and the Act.

6.9 *Bonds*. The Trustees shall obtain from an authorized surety company such bonds as may be required by law, covering such persons and in such amounts (but not less than required by law) as the Trustees, in their discretion, may determine. [The cost of premiums for such bonds shall be an expense of the Trust.]

6.10 *Insurance.* The Trustees may, in their discretion, obtain and maintain policies of insurance, to the extent permitted by law, to insure themselves, the Trust as such, as well as employees or agents of the Trustees and of the Trust, while engaged in business and related activities for and on behalf of the Trust (1) with respect to liability to others as a result of acts, errors or omissions of such Trustee or Trustees, employees or agents, respectively, provided such insurance policy shall provide recourse by the insurer against Trustees as may be required by law, and (2) with respect to injuries received or property damage suffered by them. The cost of the premiums for such policies of insurance except for recourse insurance shall be an expense of the Trust.

6.11 *Information to Participants and Beneficiaries.* The Trustees will provide Participants and Beneficiaries such information as may be required by law.

6.12 *Accountants and Actuaries.* The Trustees shall engage one or more independent qualified public accountants and one or more enrolled actuaries to perform all services as may be required by applicable law and such other services as the Trustees may deem necessary.

6.13 *Compensation.* The Trustees and their successors shall receive reasonable compensation for services rendered, and shall be reimbursed for expenses properly and actually incurred in the performance of their duties with the plan; provided, however, that no Trustee who receives full-time pay from an employer or an association of employers, whose employees are participants in the Trust, or from an employee organization whose members are participants in such Trust shall receive compensation

from such Trust, except for reimbursement of expenses properly and actually incurred.

6.14 *Reports.* All reports required by law to be signed by one or more Trustees shall be signed by all of the Trustees, provided that all of the Trustees may appoint, in writing and by resolution adopted and spread on the minutes, one or more of their members to sign such report on behalf of the Trustees.

6.15 *Records of Trustee Transactions.* The Trustees shall keep true and accurate books of account and a record of all of their transactions and meetings (including actions taken at such meetings and by informal action of the Trustees), which records and books shall be audited at least annually by a certified public accountant. A copy of each audit report shall be furnished both to the Trustees and shall be available for inspection by interested persons at the principal office of the Trustees.

6.16 *Construction and Determinations by Trustees.* Subject to the stated purposes of the Trust and the provisions of this Agreement, the Trustees shall have full and exclusive authority to determine all questions of eligibility, amount of benefits payable under the Pension Trust, methods of providing or arranging for benefits and all other related matters. They shall have full power to construe the provisions of this Agreement, the terms used herein, and the Pension Trust, bylaws and regulations issued hereunder. Any such determination and any such construction adopted by the Trustees in good faith shall be binding upon all of the parties hereto and the employees, Participants and Beneficiaries hereof to the

extent permitted by law. No matter respecting the foregoing or any difference arising thereunder or any matter involved in or arising under this Trust Agreement shall be subject to the grievance or arbitration procedure established in any collective bargaining agreement between the Employer and the Union, provided, however, that this clause shall not affect the rights and liabilities of any of the parties under any of such collective bargaining agreements.

6.17 *Liability.*

a. Every act done, power exercised or obligation assumed by the Trustees pursuant to the provisions of this Agreement or in carrying out this Trust shall be done, exercised or assumed, as the case may be, by the Trustees in their capacity as Trustees and not otherwise, and every person, corporation, partnership, association or firm contracting or otherwise dealing with the Trustees shall look only to the Trust for payment under such contract or any obligation arising under this Agreement, in whole or in part.

b. Except as provided by law, no Trustee shall be liable for any act, ommission or failure to act or for any mistake of fact or law or error of judgment or for loss or depreciation in the value of the Trust occurring by reason thereof, nor shall any Trustee be liable for the acts or defaults of any other Trustee under this Trust Agreement or for any acts or defaults of any officer, agent, attorney or employee in whose appointment the Trustee shall have exercised reasonable care and diligence.

6.18 *Reliance on Written Instruments.* Each of the Trustees shall be protected in acting upon any paper or

document believed by him to be genuine and to have been made, executed or delivered by the proper parties purporting to have made, executed or delivered the same and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter pertaining to the administration or execution of the Plan. The Trustees may rely upon an instrument in writing purporting to have been signed by, or upon telegrams purporting to have been transmitted by, any Trustee, Employer or the Unions as conclusive evidence of the fact that the said Trustee, Employer or the Unions have duly taken the action stated to have been taken in such instrument or telegram.

6.19 *Reliance by Others.* No party dealing with the Trustees shall be obligated (1) to see to the application to the stated Trust purposes of any funds or property of the Trust or (2) to see that the terms of this Trust Agreement have been complied with or (3) to inquire into the necessity or expediency of any act of the Trustees. Every instrument executed by the Trustees shall be conclusive evidence in favor of every person relying thereon (1) that at the time of the execution of said instrument the Trust was in full force and effect, (2) that the instrument was executed in accordance with the terms and conditions of this Trust Agreement, and (3) that the Trustees were duly authorized and empowered to execute the instrument.

6.20 *Discharge of Liability.* The receipt of the Trustees for any money or property or checks (after such checks are honored at the bank and paid to the Trust) shall discharge the person or persons paying or transferring the same.

6.21 *Multiple Benefit Schedules*. The Trustees shall be authorized to accept contributions at more than one rate and they shall provide in the Pension Trust for levels of benefits appropriate for each such rate of contribution. However, it is the intention of the parties hereto that contributing Employers hereto shall, to the extent feasible, negotiate identical contribution rates.

ARTICLE VII.
CONTRIBUTIONS AND COLLECTIONS

7.1 *Employer Contributions*. Each Employer shall make prompt contributions or payments to the Trust in such amount and under the terms as are provided for in the applicable collective bargaining agreement in effect from time to time between the Employer may also be required to make contributions in such amount and under such terms as such Employer may be obligated, in writing, to make, provided that such contributions shall be subject to acceptance by the Trustees. The employer agrees that such contributions shall constitute an absolute obligation to the Trust, and such obligation shall not be subject to set-off or counterclaim which the Employer may have for any liability of the Union or of an Employee.

7.2 *Transmission of Reports and Contributions*. The Trustees shall establish a uniform system among the Employers for the timely transmission of reports and contributions and shall also establish a periodic date on which such reports and contributions shall be due. The Trustees shall immediately notify any Employer of a delinquency, mistake or discrepancy in such Employer's

report or contribution. The Trustees may at any time have an audit made by an accountant or any representative or employee of the Trust of the payroll and wage records of any Employer in connection with the said contributions and/or reports.

7.3 *Trustees Sanctions.*

a. Collection and Enforcement of Payments. The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint, or the Administrative Manager if one has been appointed and when directed by such committee or by the Board of Trustees, shall have the power to demand, collect and receive Employer payments and all other money and property to which the Trustees may be entitled and shall hold the same until applied to the purposes provided in this Trust Agreement. They shall take such steps, including the institution and prosecution of, or the intervention in, such legal or administrative proceedings as the Trustees, in their sole discretion, determine to be in the best interest of the Trust for the purpose of collecting such payments, money and property, without prejudice, however, to the rights of the Union to take whatever steps it deems necessary and wishes to undertake for such purposes.

b. Contributions to the Trust shall be due and payable fifteen (15) days following the end of the preceding month. The failure of an Employer to pay all amounts due within thirty (30) days following the due date, whether willful or otherwise, shall subject the delinquent Employer to a payment of liquidated damages of an additional ten percent (10%) of the amount due plus all

costs and reasonable attorneys' fees incurred in connection therewith. Payments and liquidated damages unpaid by the first day of the following month shall be subject to an interest charge of eight percent (8%) per annum on the payments and liquidated damages.

If legal action is taken to recover the amount due the Trust, the delinquent Employer shall also be required to pay all court costs, including reasonable attorneys' fees. In addition to the other provisions as herein set forth, any Employer who is delinquent in his payment to the Trust shall make such Employer primarily liable and responsible to its employees or employees' estates for any claim for benefits accruing to such employees or employees' estates which would otherwise be due such employees or employees' estates under the administration of this Trust. The payment of any and all such claims shall not operate to relieve such Employer from his liability to make the payments due the Trust, including the liquidated damage payment.

Any Employer who on more than one occasion during any one year becomes delinquent in its payment to the Trust shall be required to post a bond with the Trustees in an amount equivalent to the total contributions which it was obligated to make during the preceding calendar year.

Nonpayment by any Employer of any contribution or other monies owed to the Trust shall not relieve any other Employer from his or its obligation to make required payments to the Trust.

c. Each Employer shall promptly furnish to the Trustees, on demand, the names of employees, their

social security numbers, the hours worked by each employee and such other information as the Trustees may reasonably require in connection with the administration of the Trust and for no other purposes. The Trustees may by their Administrative Manager or Certified Public Accountant examine the pertinent employment and payroll records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by majority vote of the Trustees in connection with the proper administration of the Trust. The Union shall, upon the request of the Trustees, promptly furnish information in respect to an employee's employment status.

ARTICLE VIII.
BENEFICIAL RIGHTS

8.1 *No Rights, Title or Interest of Employers and Union.* No Employer or Union shall have any right, title or interest in or to the Trust or any part thereof except that, upon either the written request of the Employer or Union, the Trustees shall return to the Employer or Union the amount of the Employer's or Union's contribution made by the Employer or Union by good faith mistake of fact or the amount of the Employer's or Union's contribution disallowed as a deduction under Code Section 404.

The Trustees shall not return any portion of the Employer's or Union's contribution made pursuant to Article II more than one (1) year after:

(a) The Employer or the Union made the contribution by good faith mistake of fact; or

(b) The disallowance of the contribution as a deduction, and then, only to the extent of the disallowance.

Except as herein before provided, no Employer shall directly or indirectly, receive any refund on contributions made by it to the Trust, or directly or indirectly participate in the disposition of the Trustor receive any benefits from the Trust. No employee shall have any individual right, title, interest, or claim against any Employer, Employer's contribution, or the Trust, except as may be expressly provided for in the Plan and in this Agreement and Declaration of Trust.

8.2 *Limitations Upon Beneficial Rights of Employees.* No employee, Participant, or any Beneficiary of a Participant shall have any right, title or interest in or to the Trust or any part thereof, provided, however, that any Participant who shall be covered by the Plan, or his Beneficiaries under such Plan, shall be entitled to the benefits in the forms and amounts and subject to the terms and conditions of this Trust; provided, further, however, the benefits shall be free from the interference and control of any creditor, and no benefits shall be subject to any assignment or other anticipation or subject to seizure or sale under any legal, equitable or any other process, and, in the event that any claim or, benefit shall, because of any debt incurred by or resulting from any other claim or liability against any Participant or Beneficiary, by reason of any sale, assignment, transfer, encumbrance, anticipation or other disposition made or attempted by said Participant or Beneficiary, or by reason of any seizure or sale or attempted sale under any legal, equitable or other process, or in any suit or proceeding, become payable, or be liable to become payable, to any

person other than the Participant or Beneficiary for whom the same is intended, as provided herein and in the Trust.

ARTICLE IX.
TERMINATION OF TRUST

9.1 *Conditions of Termination.* This Trust Agreement shall cease and terminate upon the happening of any one or more of the following events:

a. In the event the Trust shall, in the opinion of the Trustees, be inadequate to carry out the intent and purpose of this Trust Agreement or be inadequate to meet the payments due or to become due under this Trust Agreement and under the plan of benefits to Participants and Beneficiaries already drawing benefits;

b. In the event there are no individuals living who can qualify as employees hereunder;

c. In the event of termination by action of the Union and the Employers;

d. In the event of termination as may be otherwise provided by law.

9.2 *Procedures in Event of Termination.* In the event of termination, the Trustees shall:

a. Make provisions out of the Trust for the payment of expenses incurred up to the date of termination of the Trust and the expenses incidental to such termination;

b. Arrange for a final audit and report of their transactions and accounts for the purpose of termination of their Trusteeship;

c. Apply the Trust to pay any and all (or provide for the payment of) benefits accrued prior to the date of termination in the manner and order of preference set forth in provisions of the Plan then in effect;

d. Give any notices and prepare and file any reports which may be required by law.

ARTICLE X.
MISCELLANEOUS

10.1 *Law Applicable.* This Trust is created and accepted in the State of Minnesota, and all questions pertaining to the validity or construction of this Trust Agreement and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of Minnesota, except as to matters governed by federal law.

10.2 *Refund of Contributions.* In no event shall any Employer, directly or indirectly, receive any refund on contributions made by them to the Trust (except to the extent permitted by law), nor shall an Employer directly or indirectly participate in the disposition of the Trust. Upon payment of contributions to the Trustees, all responsibilities of the Employer for each contribution shall cease, and the Employer shall have no responsibilities for the acts of the Trustees, nor shall an employer be obliged to see to the application of any funds or property of the Trust or to see that the terms of the Trust have been complied with.

10.3 *Judicial Settlements and Action by Trustees.* The Trustees shall be entitled, at any time, to have a judicial

settlement of their accounts and to seek judicial protection by any action or proceeding they determine necessary and, further, to obtain a judicial determination or declaratory judgment as to any question or construction of this Trust Agreement or for instructions as to any action thereunder and, further, as to any questions relating to the discharge of their duties and obligations under, or in connection with the administration of this Trust and as to the distribution of assets belonging to the Trust. Any such determination, decision or judgment shall be binding upon all parties to, or claiming under, this Trust Agreement.

10.4 *Withholding Payment.* In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until there shall have been made an adjudication of such question or dispute which, in the Trustees' sole judgment, is satisfactory to them or until the Trustees shall have been fully protected against loss by means of such indemnification agreement or bond as they, in their sole judgment, determine to be adequate.

10.5 *Gender.* Whenever any words are used in this Trust Agreement in the masculine gender, they shall also be construed to include the feminine or neuter gender in all situations where they would so apply; whenever any words are used in the singular, they shall also be construed to include the plural in all situations where they would so apply, and wherever any words are used in the plural they shall also be construed to include the singular.

10.6 *Amendment of Trust Agreement.*

a. The provisions of this Trust Agreement may be amended at any time by either of the following methods:

1. An amendment may be proposed by any Trustee or any signatory in this Agreement. A majority of the Trustees voting in accordance with the provisions of Section 6.2 shall first concur in the amendment and thereafter shall submit the same in writing to the Union and the Employers signatory to the original Trust Agreement. Within thirty (30) days after the date of mailing of said amendment, the Union or such Employers signatories may present in writing to the Trustees objections thereto. The amendment shall not become effective if (a) the Union objects to the amendment, or (b) a majority of such Employers signatories hereto or of such Employers employing a majority of the employees covered by this Trust Agreement object to the amendment. If no objections are made, or if the objections are insufficient in number pursuant to the provisions of this Section, then the amendment shall become effective as of the effective date set forth therein.

2. An amendment may be proposed by any Trustee and may be adopted by the unanimous vote of the Full Board of Trustees.

b. No amendment shall be adopted which alters the basic purpose of this Trust Agreement or of the Plan; conflicts with any applicable law or government regulation; causes the use or diversion of any part of the Trust for purposes other than those authorized herein; or so amend this Trust Agreement that there shall not be an equal number of Employer Trustee votes and of Union

Trustee votes in the administration of the Trust. An amendment may have retroactive effect, if deemed necessary by the Trustees.

10.7 *Article and Section Titles.* The Article and Section titles are included solely for convenience and shall in no event be construed to affect or modify any part of the provisions of this Trust Agreement or be construed as part thereof.

10.8 *Counterparts.* This Trust Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Union Trustees and Employer Trustees have caused this Restated Agreement and Declaration of Trust to be executed this 13th day of December, 1979.

In the presence of:

/s/ Illegible

/s/ Fred Beatty

/s/ Illegible

/s/ Fred Beatty

CESES TERMINAL, INC.

BY /s/ Illegible

AMERICAN GRAIN TRIMMERS, INC.

BY /s/ Illegible

EMPLOYER TRUSTEES:

/s/ Illegible

/s/ Illegible

UNION TRUSTEES:

/s/ Illegible

GUTHRIE-HUNTER, INC.

BY /s/ Illegible

HANNA MINING COMPANY, ASSOC.

BY /s/ Illegible

S. A. MCLKHWAN

BY /s/ Illegible

ROCKES TERMINAL & SHIPPING CORPORATION

BY /s/ Illegible

THE SVENSON SHIPPING AGENCY

BY /s/ Illegible

EMPIRE STEVEDORING COMPANY, INC.

BY /s/ Illegible

FEDERAL MARINE TERMINALS, INC.

BY /s/ Illegible

GREAT LAKES STORAGE & CONTRACTING COMPANY, INC.

BY /s/ Illegible

NORTH CENTRAL TERMINAL OPERATIONS, INC.

BY /s/ Illegible

GENERAL CARGO WORKERS, LOCAL NO. 1366

BY /s/ Illegible

GENERAL CARGO WORKERS, LOCAL NO. 1037

BY /s/ Illegible

GREAT LAKES ASSOCIATES, INC.

BY /s/ Illegible